

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, and in particular, S.36 thereof;

**AND IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, and in particular, S.90(1) thereof;

**AND IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, and in particular, S.91 thereof;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order or Orders for approval of recovery of the cost consequences of all facilities associated with the development of the proposed Lobo C Compressor/Hamilton-Milton Pipeline project;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order or Orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Hamilton, City of Burlington, and the Town of Milton, and leave to construct a compressor and ancillary facilities in the Municipality of Middlesex Centre.

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**GAPLO BRIEF OF AUTHORITIES**

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*Ontario Energy Board*

*Commission de l'énergie de l'Ontario*



# **Ontario Energy Board**

## **Filing Requirements For Electricity Transmission Applications**

### **Chapter 4**

#### **Applications under Section 92 of the Ontario Energy Board Act**

**July 31, 2014**

2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.”

### **Section 97**

Section 97 requires that information on land requirements must be included as part of the leave to construct application. Section 97 states, “leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.” An affected landowner means those landowners of property upon, over or under which it is intended to construct facilities.

### **Section 99**

Section 99 relates to expropriation. The Board can order the expropriation of land if it is in the public interest. Compensation issues are dealt with by the *Expropriations Act* and the Ontario Municipal Board. The Board’s consideration of the public interest may be more expansive in a section 99 application than in a section 92 application. For an example, see the discussion of the public interest in Dufferin Wind Power Inc. EB-2013-0268, Procedural Order No. 3 and Decision on Issues, February 7, 2014.

### **Sections 101 and 102**

Upon request, under Section 101 the Board can grant authority to construct upon, over or under a highway, utility line or ditch. Section 102 sets out how compensation for damages will be dealt with if it cannot be agreed upon.

## **4.2.2 Related Regulatory Hearings**

In addition to a leave to construct approval, most projects will require various other (non-Board) regulatory approvals: for example, an environmental assessment approval. In some cases, these approvals will be obtained after the Board issues an order granting leave to construct.

It is possible that other approvals may result in material changes to the project after the project has been reviewed by the Board (for example, a routing change or the imposition of additional costs to rate payers that were not known to the Board). Under such circumstances, an applicant is required to advise the Board. Depending

4. indication of where Section 41(9) of the Electricity Act, regarding disagreement over the location of structures, equipment or facilities over, under or on Public streets and highways, may be applicable.

#### **4.3.4 Exhibit D: Design Specification and Operational Data**

##### **4.3.4.1 Operational Details**

The application must provide the following details on the planned operation of the transmission line:

- the control stations; and
- monitoring and metering locations.

#### **4.3.5 Exhibit E: Land Matters**

The following information with respect to land matters is required in support of an application:

##### **4.3.5.1 Description of Land Rights**

A description of the land rights required must be provided including:

1. the type of land rights proposed to be acquired for the project and related facilities (e.g. easement, fee simple);
2. the nature and relative proportions of land ownership along the proposed route (i.e. freehold, Crown or public lands); and,
3. where no new land rights are required, a description of the existing land rights that allow for the project;
4. where no new land rights are required, but the land rights of adjacent properties might be affected e.g. building restrictions on those lands;
5. where section 41(9) of the Electricity Act may be brought to bear for the use of public roads and highways as part of the route.

#### **4.3.5.2**      *Land Easements Required*

A description of the land area required including:

1. the width(s) of any right-of-way required on new and/or existing easements;
2. the location and ownership of land with existing easements and of any new easements or land use rights that will be required; and
3. the need and amount of additional temporary working rights required at designated locations such as crossings of rivers, roads, railways, drains and other facilities.

#### **4.3.5.3**      *Early Access to Land*

Section 98 of the Act allows a person to apply to the Board for an interim order authorizing that person to enter on land for certain purposes if the person has applied for leave under section 90 or 92 and has complied with section 94. Section 94, as noted above, requires an applicant to file with the application a map showing the general location of the proposed work and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed work is to pass.

#### **4.3.5.4**      *Land Acquisition Process*

A description of the land acquisition process including:

1. identification of the properties and the property owners and/or tenants affected by the proposed construction (landowners line list);
2. evidence of discussion and/or agreements regarding sections of the route where section 41(9) of the Electricity Act may be applicable.

#### **4.3.5.5**      *Land-related Forms*

Section 97 operates as a condition precedent to the exercise of the Board's power to grant a leave to construct order pursuant to section 92 of the Act. Under section 97, the Board exercises discretion to approve the form of the agreements that an applicant may offer to an Ontario landowner in relation to the approved route of the proposed transmission or distribution line.

Section 97 of the Act states, "leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land

affected by the approved route or location an agreement in a form approved by the Board.”

Appendix A sets out the types of clauses which must be included in an agreement. An applicant must provide this form of agreement to the land owner’s attention and it is expected that this form of agreement will be the initial starting point for a negotiation between a landowner and a utility. However, it is open to the landowner and utility to develop the substantive content of these clauses and any other clauses mutually agreed to in the agreement<sup>2</sup>. Further, with the mutual agreement of both the landowner and the utility, certain clauses may be eliminated in appropriate circumstances.

#### **4.3.6 Exhibit F: System Impact Assessment (“SIA”)**

All applicants are required to provide evidence to the Board that connection of the applied for line will not affect the reliability of the IESO-controlled grid. This takes the form of an SIA conducted by the IESO as a part of the IESO Connection Assessment and Approval process.

The IESO evaluates the design of the project and its impact on the reliability of the integrated power system, and identifies any transmission facility enhancements that may be required in order for the facilities to have no negative effect upon the reliability of the grid. The Applicant must provide a statement confirming that it will implement the Requirements noted by the IESO in the SIA.

In the absence of a final SIA, the applicant must submit a draft SIA and inform the Board when the final SIA will be available. Final approval by the IESO and conformance with its conditions is a requirement for granting leave to construct.

#### **4.3.7 Exhibit G: Customer Impact Assessment (“CIA”)**

All applicants are required to provide evidence to the Board that the incorporation of the applied for facilities will not degrade the electricity service of customers of the transmitter to which the applied for line is connecting. This evidence takes the form of the Customer Impact Assessment (“CIA”).

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<sup>2</sup> In *Conserve Our Rural Environment v Dufferin Wind Power Inc.* (2013) ONSC 7307, (“CORE”) Justice Gordon stated:

It is important to understand that what the Board approved was a *form* of agreement which is the subject of subsequent negotiation between the parties. It represents terms from which the party propounding the project may not unilaterally resile.

## Appendix A: Draft Form of Lease or Easement Agreement

### **Essential Easement Considerations**

The form of agreement will be the initial starting point for a negotiation between a landowner and utility. However it is open to the landowner and utility to develop the substantive content of these clauses and any other clauses mutually agreed to in the agreement. Please note that adhering to this form of agreement does not limit the Board's discretion to either approve or not approve a form of agreement submitted in a proceeding.

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#### **1. Legal Description of Properties**

A complete and accurate description of each of the affected properties must be provided. A full legal description is ideal, but even when this is not available, some description is necessary, even if only described by address, visual depiction or reference to the owners.

#### **2. Description of the Easement Area**

The easement area (in other words the portion of property to which one party is granted permission to use or access) must be depicted visually. Such a depiction need not be elaborate, but a clear "drawing" of the relevant easement area will help provide clarity and avoid potential disputes. A professional survey is helpful

#### **3. Covenant Not to Disturb the Use of the Easement – Right of Access**

Although it may have a clearly defined right to use the owner's property, the party granted easement rights must also be sure that the owner's use of the property will not create practical problems. The easement agreement should include language that protects the party granted the easement rights a right to undisturbed use of the easement.



#### **4. Determination of Maintenance Obligations**

Even after rights and non-disturbance issues are clarified, the parties to an easement agreement face the issue of who will take care of that portion of the property, pay for any needed repairs or address related problems that occur. The parties should determine who will maintain the easement area.

#### **5 Decommissioning**

A decommission clause should set out that the energy company will be responsible to cover the cost of decommissioning the facilities and restoring any damage done to the easement lands. This clause should also have specific procedures for the decommissioning process.

#### **6. Independent Legal Advice (“ILA”)**

Provision must be made that both parties have had the option to obtain legal advice. Note in some cases before the Board, the agreement has provided that the ILA for the landowner would be paid for by the utility.

#### **7. Liability: Indemnification and Exculpation**

The parties should consider their potential liabilities with respect to their ownership or use of the property.

#### **8. Insurance**

An easement agreement needs to clearly state any obligations of the parties to maintain any forms of insurance. Considerations would obviously include property insurance, but may also include other coverage as well, as dictated by the circumstances.

#### **9. Default Provisions and Termination**

Some consideration must be made for events or behavior on the part of either party that will terminate the easement. A property owner may want to include certain activities (including failure to make any required payments) that will result in termination of the easement. Conversely, the other party will want to clarify that breaches (or at least certain breaches) of the agreement explicitly do not result in termination of its easement rights. Possible considerations must include failure to make requirement payments to the property owner, failure to fulfill any maintenance obligations, failure to pay any required taxes or insurance premiums, and any other matters that are deemed relevant by the parties. Much of the detail with respect to default and termination will be dependent upon the unique nature of each situation.

## **10. Dispute Resolution**

Provision setting out the dispute resolution procedure to be used in case of disagreement.

End of document



**EB-2005-0550**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, c.15, Schedule. B;

**AND IN THE MATTER OF** an Application by Union Gas Limited, pursuant to subsection 90(1), for an Order or Orders granting leave to construct natural gas pipeline and ancillary facilities in the Township of Strathroy-Caradoc in the Township of Middlesex Centre in the County of Middlesex.

**BEFORE:** Cynthia Chaplin  
Presiding Member

Ken Quesnelle  
Member

## **DECISION AND ORDER**

### **Application and Proceeding**

Union Gas Limited ("Union") applied on December 20, 2005 for an order of the Board granting leave to construct approximately 18.1 kilometres of 48 inch diameter steel natural gas pipeline in the County of Middlesex to expand the Trafalgar transmission system ("Strathroy to Lobo expansion"). The Application has been assigned Board File No. EB-2005-0550.

The proposed Strathroy to Lobo expansion will allow Union to increase the capacity of the Trafalgar gas transmission system to meet the increasing gas requirements for current and future customers. The proposed facilities will be constructed, owned and operated by Union; construction is planned to commence in the spring of 2007, and the pipeline will be in-service later that year.

The proposed pipeline will proceed from the existing Strathroy Gate Station, located at Lot 9, Concession IX, Township of Strathroy-Caradoc to the existing Lobo Station, located at Lot 14, Concession VII, Township of Middlesex Centre, all in the County of Middlesex. In addition to the construction of the pipeline, Union will install additional compression at Parkway and yard pipe modifications to tie-in at the Lobo compressor station; these are not part of Union's leave to construct application.

The Board issued a Notice of Application (the "Notice") on January 9, 2006. Union served and published the Notice as directed by the Board. The following parties were intervenors in the proceeding:

- GAPLO-Union (Strathroy Lobo) landowner group;
- Strathroy-Lobo Landowner Committee, a landowner group;
- Robert Alex Collins, landowner;
- Angela Mostrey, landowner;
- Mostrey Farms Limited, landowner;
- Enbridge Gas Distribution Inc. ("Enbridge");
- Sithe Global Power Goreway ULC ("Sithe"), power generator;
- Alberta Northeast Gas Limited ("ANE"), shipper and Union's customer;
- TransCanada PipeLines Limited ("TCPL"); and
- Aiken & Associates, energy consultant.

The Board received written submissions from several parties objecting to a written hearing. Upon considering these submissions the Board decided to proceed by way of an oral hearing.

### **Settlement Agreement**

The Board convened a settlement conference to provide the parties with an opportunity to settle the disputed issues. GAPLO and Union were active participants in the settlement conference. A proposed settlement agreement was reached and was presented to the Board on May 9, 2006. The Board considered and approved the settlement agreement and adjourned the hearing as there were no other disputed issues in the proceeding.

The Board notes that the format used to present the proposed Settlement Agreement was a chart which had been used by the parties to organize issues, list impacts and record agreed upon mitigation measures for each issue and impact listed. The Board also notes that the chart had an entry headed 'Socio-economic' which, unlike the rest of the issues, had no mitigation measures recorded beside it. The parties advised that any issues related to that heading were the subject of a separate agreement which was not before the Board and which did not form part of the proposed Settlement Agreement. As a result, those impacts and issues were not before the Board, and the Board expressly makes no finding concerning them.

On May 16, 2006, Union filed a revised Letter of Understanding and a revised Form of Easement for Transmission Pipeline. Both of these documents reflect the settlement proposal.

### **Project Need**

Union indicated that the need for the proposed Strathroy to Lobo expansion was determined entirely as a result of obtaining binding bids in two open seasons and executing M12 transportation contracts with 13 parties. The total new contracted demand is 509,142 GJ/d for terms of 10 years or more, all beginning November 1, 2007. According to Union, existing contracts and renewals for 2006/2007 indicate total continuing firm contract demand of 4,295,488 GJ/d, and the net additional demand starting November 1, 2007 is 499,143 GJ/d (one existing shipper turned back 10,000 GJ/d of capacity). The proposed Strathroy to Lobo expansion and additional compression at Parkway would increase system capacity by 492,175 GJ/d.

Union forecasted total system demand for both firm transportation and in-franchise service to be 6,535,326 GJ/day for 2007/2008. Union determined that the total physical capacity will be 6,444,863 GJ/d, which is comprised of the physical design day capacity of 5,805,444 GJ/d (including the Strathroy to Lobo expansion and additional Parkway compression) and 639,419 GJ/s in projected obligated deliveries at Parkway. Union proposed to meet the remaining shortfall of 90,463 GJ/day (from the projected demand of 6,535,326 GJ/d) by purchasing a service at Parkway.

According to the evidence, the main objective was to select the route which would take advantage of the existing Dawn Trafalgar system corridor. Evaluation of the alternative routes focused on easement, agricultural, socio-economic and bio-physical considerations. Public consultation provided comments on alternatives and those comments were taken into account when finalizing the location of the preferred route. The proposed route parallels the existing easement for its entire length.

### Board Findings

The Board finds that Union followed the OEB Guidelines in selecting the proposed route and that the location of the proposed route within the existing pipeline corridor and parallel to the existing easement is acceptable from both the environmental and socio-economic perspectives.

### **Land Rights and Form of Easement Agreement**

Union indicated that it required a permanent easement from 44 landowners and a temporary easement from 26 of these landowners in order to secure land rights for the construction and operation of the proposed pipeline. According to Union's evidence, all the easement agreements have either been obtained or will be obtained prior to the construction commencement.

Union negotiated with the landowners individually or through representatives of the two landowner groups, GAPLO and the Strathroy-Lobo Landowner Committee. Union successfully negotiated permanent and temporary land rights with a number of individual landowners and with the Strathroy-Lobo Landowner Committee members. These negotiations took part separately from the Board sponsored settlement conference.

GAPLO participated in the settlement conference which resulted in an agreement on a number of disputed issues between Union and GAPLO. The disputed issues were related to the mitigation of impacts and residual cumulative effects of the proposed pipeline construction and operation. Compensation for land rights to the landowners was also negotiated but was not part of the scope of the Board's proceeding. The settlement proposal, which was accepted by the Board, is reflected in a revised Letter of Understanding and in a revised form of Easement Agreement which Union filed with the Board and all intervenors on May 16, 2006.

### Board Findings

The Board notes that the required permanent or temporary easements have either been acquired or are pending. The Board approves the form of agreement (the amended easement agreement) filed by Union and offered to all directly affected landowners along the approved route.

### **Other Permits and Approvals**

Union stated that the following environmental permits are required prior to commencing construction of the proposed project:

- Permit to Take Water from the Ministry of the Environment;
- Work Permit from the Ministry of Natural Resources;
- Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Permit from St. Clair Region Conservation Authority;
- Authorization for works or undertakings affecting fish habitat from the St. Clair Conservation Authority, or Letter of Advice from the Department of Fisheries and Oceans, if elevated for review by the Conservation Authority to the Department.

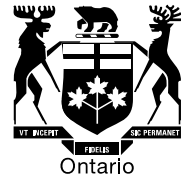
Union stated that it would obtain these permits in the period between November 2006 and March 2007.

### Board Findings

The Board accepts Union's evidence that it is in the process of, and is committed to, obtaining all permits required to construct, operate and maintain the proposed pipeline. The Conditions of Approval reflect these requirements.

### **Conclusion**

Given the Board's findings on each of the specific areas above, the Board concludes that the proposed expansion is in the public interest and will grant the requested Leave to Construct, subject to the Board's Conditions of Approval attached as Appendix A to this decision.



**EB-2007-0633**  
**EB-2007-0661**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O.1998, c.15, (Schedule B);

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order granting Leave to construct natural gas pipelines in the Township of Dawn-Euphemia, in the County of Lambton.

**AND IN THE MATTER OF** an Application by Union Gas Limited to the Ministry of Natural Resources for licences to drill wells in the Township of Dawn-Euphemia, in the County of Lambton.

**BEFORE:** Pamela Nowina  
Vice Chair and Presiding Member

Bill Rupert  
Member

David Balsillie  
Member

## **DECISION AND ORDER**

Union Gas Limited (the "Applicant" or "Union") filed an application with the Ontario Energy Board, (the "Board") dated June 14, 2007, under section 90 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "Act"). The Applicant applied for an order of the Board for leave to construct approximately 3,420 metres of 36 inch Nominal Pipe Size ("NPS") pipeline between the 156 Compressor Station and the Dawn Compressor Station and 1,447 metres of 10 inch, 12 inch and 16 inch NPS storage gathering pipelines within the Dawn 156 Pool ("156 Pool") and the Dawn 59-85 Pool ("59-85 Pool"). Union Gas has proposed to increase the deliverability of the 156 Pool and the 59-85 Pool to meet the needs of customers seeking high deliverability storage



services. The proposed facilities are located in the Township of Dawn-Euphemia, in the County of Lambton. The Board assigned File No. EB-2007-0663 to this Application.

By letter dated June 12, 2007 and pursuant to section 40 of the Act, the Ministry of Natural Resources, Petroleum Resources Centre, referred to the Board an application by Union for licences to drill five injection/withdrawal wells in the 156 Pool; to deepen the recently drilled stratigraphic test well in the 156 pool so that it can be used as an injection/withdrawal well; and to drill five new injection/withdrawal wells in the 59-85 Pool. The Board assigned File No. EB-2007-0661 to this Application.

For the reasons set out below, the Board finds the construction of the proposed pipelines is in the public interest and grants Leave to Construct, subject to certain Conditions of Approval, which are attached to this Decision. With regard to the application for well licences, the Board has prepared a favourable report to provide to the Ministry of Natural Resources ("MNR"), which is subject to certain Conditions of Approval and is attached as Appendix "B" to this Decision.

### **The Proposed Pipelines and Proposed Wells**

The 156 Pool will require 775 m of NPS 12 and 70 m of NPS 16 gathering lines. The 59-85 Pool will require 68 m of NPS 10, 459 m of NPS 12 and 76 m of NPS 16 gathering line. The proposed pipelines are designed to transport the expected flows to and from the new wells. A NPS 36 pipeline will be constructed from the 156 Compressor Station to Dawn to augment the capacity of the existing pipelines. The pipeline will be approximately 3,420 m in length.

Five new wells will be added to the 156 Pool (UD.280, UD.281, UD.283, UD.284, UD.285). Five new wells will be added to the 59-85 Pool (UD.273, UD.274, UD.275, UD.276, UD.277). One existing well will be deepened in the 156 Pool. Three existing wells (D.59, D.85 and D.139) in the 59-85 Pool will be abandoned as part of the project.

A map is attached as Appendix "A" that shows the location of the proposed pipeline and 156 and 59-85 Pool locations.

### **Proceeding**

The Board issued the Notice of Application on July 5, 2007, which was published and served by Union as directed. TransCanada Energy Ltd. was the only intervenor. Three

- Alternative Route C travels east along an east-west fence line in Lot 21, Concession 2 to Cuthbert Road where it turns south, travelling along the west side of the road allowance until the division of Lots 27 and 28 where it then travels westward to join the proposed alignment of Alternative Route B.

The Environmental Report stated that the alternative routes were subject to a comparative analysis and that the comparative analysis identified a Preliminary Preferred Route that was presented on February 28, 2007 at a Public Information Session. The Environmental Report stated that in selecting the Preliminary Preferred Route, the alternative routes were compared quantitatively and Alternative Route B had the least environmental and socio-economic impacts. The Environmental Report also stated that Union and Stantec selected the Preliminary Preferred Route for the proposed pipeline based on more detailed field surveys, environmental and socio-economic constraints, consultation with stakeholders, and comments received during the Public Information Session that was held on February 28, 2007.

The Board is satisfied that good reasons exist for choosing not to follow the pre-existing right-of-way and that the selection of the Preliminary Preferred Route was made after consideration of all relevant environmental impacts. The Board finds that the pipeline design and specifications are acceptable and that the proposed route is the best alternative for the location of the pipeline.

### **Land Issues and Form of Easement**

Section 97 of the Act provides that a leave to construct will not be granted until the applicant has satisfied the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

Union has filed with the Board a form of easement agreement that was offered and will be offered to the affected landowners. Union has informed the Board that it requires four permanent and two temporary easements to construct the proposed pipeline and options for permanent easements are held on all four properties.

Union submitted that the well drilling, constructing gathering lines and roadways will be done on four landowner's properties. Letters of Acknowledgement have been signed with these landowners.

The Board is satisfied that Union is effectively resolving the landowner issues associated with the project. The Board approves the form of easement which has been filed by Union.

### **First Nations Consultation**

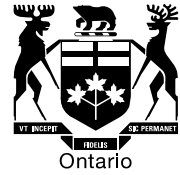
The Environmental Report provided information on the consultations with First Nations relative to the proposed project. Two First Nations within the study area for the proposed pipeline were identified; Aamjiwnaang First Nation (“AFN”) and Walpole Island First Nation (“WIFN”). Letters were sent on January 8, 2007 to seek information regarding the status of lands within the study area. The letters outlined the status of the environmental study and invited comments and participation. As well, AFN and WIFN were sent letters on February 8, 2007 to notify them of the Public Information Session that was scheduled for February 28, 2007. Similar letters were sent to other government agencies. No comments were received from AFN.

WIFN contacted Stantec. The discussions and meeting with WIFN are described in the Environmental Report as follows:

*WIFN contacted Stantec on February 23, 2007 to provide information with regards to lands that they are currently in litigation over. The Study Area lies within an area covered by the Treaty of 1822. WIFN is currently seeking recognition of their Aboriginal Title covering this Treaty Area. WIFN requested that the area be investigated for any archaeological resources that may relate to their occupation or use of the land. They also requested that Stantec investigate the presence of any rare or endangered species designated by the province or the federal government.*

*A meeting between the WIFN and Union Gas was held on March 21, 2007 to discuss the Union Gas Dawn 156/59-85 Project and several other Union Gas projects. This meeting, requested by WIFN, did not identify any concerns related to the development of the propose pipeline or expansion of the existing Pools.*

With regard to archaeological resources, section 6.4.6 of the Environmental Report describes the stage I archaeological assessment which was done and recommended a stage II assessment be completed prior to construction. With regard to the presence of rare or endangered species, table 3.2 and 3.3 (App C2) of the Environmental Report lists species of national or provincial concern.



**EB-2009-0422**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, c. 15, (Schedule B);

**AND IN THE MATTER OF** an Application by Dawn Gateway Pipeline Limited Partnership for an Order or Orders granting leave to construct a natural gas pipeline and ancillary facilities in the Townships of St. Clair and Dawn-Euphemia, all in the County of Lambton, and approving the regulatory framework and the tariff for the transmission of gas on the Ontario portion of the Dawn Gateway Pipeline.

**BEFORE:** Gordon Kaiser  
Vice Chair and Presiding Member

Cynthia Chaplin  
Vice Chair

Cathy Spoel  
Member

## **DECISION AND ORDER**

[1] On November 27, 2009, the Ontario Energy Board issued a Decision<sup>1</sup> granting Union Gas Limited (“Union”) leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and the Bickford Compressor Site in the Township of St. Clair (the “St. Clair Line”). The Decision was subject to the following conditions:

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<sup>1</sup> November 27, 2009 – EB-2008-0411

- a) The sale price for ratemaking purposes shall be the fair market value which is defined as the replacement cost of the line.
- b) The ratepayers will receive a credit for ratemaking purposes equal to the amount of the cumulative under-recovery from 2003 until the time of the transaction which amount shall be placed in a deferral account for disposition in a rates proceeding.

[2] On March 2, 2010, the Board issued a second Decision<sup>2</sup> finding that the deemed sale price of the St. Clair Line for ratemaking purposes is \$13.17 million and that the deemed net gain on the sale of the St. Clair Line is \$7.97 million. The Decision also found that the cumulative under-recovery of the St. Clair line for the period 2003 to March 1, 2010 was \$6.402 million and that the entire cumulative under-recovery amount should be credited to ratepayers.

[3] On December 23, 2009, Dawn Gateway Pipeline Limited Partnership (“Dawn Gateway”) filed an application with the Board under sections 36 and 90 of the *Ontario Energy Board Act*, for approval of a regulatory framework for the Ontario portion of the Dawn Gateway Pipeline, including charging tolls at negotiated prices, and for leave to construct approximately 17 kilometers of 24 inch diameter steel natural gas pipeline in the County of Lambton.

[4] The Board granted intervenor status to Canadian Manufacturers and Exporters (“CME”); Enbridge Gas Distribution Inc. (“Enbridge”); Federation of Rental-Housing Providers of Ontario (“FRPO”); GAPLO – Union (a group of landowners), the Canadian Association of Energy and Pipeline Landowner Associations and certain landowners who are affected directly by the proposed Dawn Gateway project (collectively “GAPLO/CAEPLA”); Industrial Gas Users Association (“IGUA”); and TransCanada Pipelines Limited (“TransCanada”). The Board granted cost eligibility status to CME, FRPO, IGUA and GAPLO/CAEPLA. The Board also established a final issues list which is attached as Appendix A to this Decision.

[5] For the reasons set out below, the Board approves the leave to construct application subject to the Conditions of Approval set out in Appendix B. The Board also

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<sup>2</sup> March 2, 2010 – EB-2008-0411

approves the application for the regulatory framework subject to the conditions set out in Appendix C.

### **The Application**

[6] Dawn Gateway has applied for an Order or Orders:

- a) pursuant to section 36(1) of the *Ontario Energy Board Act, 1998*, approving the regulatory framework and the Tariff for the Ontario portion of the Dawn Gateway Pipeline;
- b) pursuant to section 90(1) of the Act, granting leave to construct approximately 17 kilometres of NPS 24 pipeline from the existing Bickford Compressor Station, located in Lot 6, Concession XII, Township of St. Clair easterly to the Dawn Compressor Station, in the Township of Dawn-Euphemia, all in the County of Lambton.

[7] This application arises out of Union's application for leave to sell the St. Clair Line. The Board concluded in EB-2008-0411 that it has jurisdiction over that portion of the proposed Dawn Gateway Pipeline from the St. Clair Valve to Dawn, and the Board stated in paragraph 4 of its Order in EB-2008-0411 that submissions could be filed regarding the appropriate regulatory framework for the proposed Dawn Gateway Pipeline.

[8] As a result of the Board's Decision in EB-2008-0411, Dawn Gateway Pipeline Limited Partnership has withdrawn its application to the National Energy Board ("NEB") and brings this application to the Board for approval of a new regulatory framework and for leave to construct.

### **The Regulatory Framework**

[9] Dawn Gateway seeks approval from the Board for a regulatory framework for the Ontario portion of the proposed Dawn Gateway Pipeline, including charging tolls at negotiated rates in accordance with the proposed Tariff which Dawn Gateway is filing for Board approval. This approach is based on Group 2 regulation as practiced by the NEB.

Dawn and enhanced access to supply. These benefits have the potential to lead to greater liquidity and reduced price volatility at the Dawn Hub. The proposed Dawn Gateway pipeline would have a capacity of 385,000 GJ/d on a firm basis, and that capacity could be expanded. Although these indirect benefits rely on projections, there are already five Precedent Agreements in place, thereby demonstrating that the enhanced access IS desired by the marketplace.

[61] None of the parties to this proceeding questioned that there is a need for this pipeline. As indicated, the Board has already addressed this issue in EB-2008-0411. The Board therefore accepts that the Applicant has established the need for the pipeline.

### **Landowner Issues**

[62] On February 12, 2010, GAPLO/CAEPLA advised the Board that it and Dawn Gateway had resolved the landowner issues in the application in accordance with the Minutes of Settlement which have been filed with the Board. As a result, GAPLO/CAEPLA withdrew from further participation in the proceedings.

[63] None of the other parties raised landowner issues. In these circumstances, the Board accepts that there are no outstanding landowner issues and approves the form of easement filed as part of the Minutes of Settlement. This is reflected in the Conditions of Approval.

### **Cost Awards**

[64] The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

[65] Cost claims, and any objections to the cost claims, for the proceeding shall be made in the timeframe set out below.

**APPENDIX B**

**Decision and Order**

**EB-2009-0422**

**DATED March 9, 2010**



## Appendix B

### Dawn Gateway Pipelines Limited Partnership

#### EB-2009-0422

#### Conditions of Approval Leave to Construct

### 1 General Requirements

- 1.1 Dawn Gateway Limited Partnership (“Dawn Gateway LP”) shall construct the facilities and restore the land in accordance with its application and the evidence filed in EB-2009-0422 except as modified by this Order and these Conditions of Approval.
- 1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2011, unless construction has commenced prior to that date.
- 1.3 Dawn Gateway LP shall implement all the recommendations of the Environmental Report filed in the pre-filed evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee (“OPCC”) review.
- 1.4 Dawn Gateway LP shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Dawn Gateway LP shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.

### 2 Project and Communications Requirements

- 2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Natural Gas Applications.
- 2.2 Dawn Gateway LP shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. Dawn Gateway LP shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.

- 2.3 Dawn Gateway LP shall give the Board's designated representative and the Chair of the OPCC ten days written notice in advance of the commencement of the construction.
- 2.4 Dawn Gateway LP shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.
- 2.5 Dawn Gateway LP shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.
- 2.6 Dawn Gateway LP shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

### **3 Monitoring and Reporting Requirements**

- 3.1 Both during and after construction, Dawn Gateway LP shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within fifteen months of the in-service date. Dawn Gateway LP shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.
- 3.2 The interim monitoring report shall confirm Dawn Gateway LP's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.
- 3.3 The final monitoring report shall describe the condition of any rehabilitated land and the effectiveness of any mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

### **4 Easement Agreements**

- 4.1 Dawn Gateway LP shall offer the form of agreement approved by the Board, as filed as part of Exhibit K1.4 (the Minutes of Settlement), to each landowner, as may be required, along the route of the proposed work.

## **5 Other Approvals and Agreements**

- 5.1 Dawn Gateway LP shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

## ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Schedule B, and in particular, s.90(1) thereof;

AND IN THE MATTER OF an Application by Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway LP") for an Order or Orders granting leave to construct a natural gas pipeline and ancillary facilities in the Townships of St. Clair and Dawn-Euphemia, all in the County of Lambton, and approving the regulatory framework and tariff for the transmission of gas on the Ontario portion of the Dawn Gateway Pipeline.

AND IN THE MATTER OF The Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, and in particular, s.43(1) thereof;

AND IN THE MATTER OF an Application by Union Gas Limited ("Union") for an Order granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair.

---

### MINUTES OF SETTLEMENT

---

Subject to the approval of the Ontario Energy Board, GAPLO-Union (Dawn Gateway), the Canadian Association of Energy and Pipeline Landowner Associations ("CAEPLA"), each of the individual Landowners, Dawn Gateway LP, and Union hereby agree to settle the issues between them in these proceedings as follows:

Definitions

1. The term Landowners shall mean individually and collectively all those individuals listed in Schedules 1 and 2 attached hereto.

Easement, Temporary Land Use & Top Soil Storage

2. Each of the Landowners agree to grant to Dawn Gateway LP an easement in the form attached hereto as Schedule 3 over their respective properties (the "DGLP Easement") which has been amended to incorporate the following changes:

- a. Clause 1 delete – "at the option of the Transferor" and "at the Transferor's option".

3. Upon registration of the DGLP Easement related to a particular Landowner, Union will surrender the easement agreement that Union has with that Landowner which that DGLP Easement is replacing as is listed in Schedule 4 hereto.

4. Each of the Landowners agree to execute a temporary land use agreement for any temporary land rights including top soil storage rights, as deemed necessary by Dawn Gateway LP for the construction of the Bickford Dawn portion of the Dawn Gateway Pipeline. The form of the temporary land use agreement is attached hereto as Schedule 5.

Letter of Understanding

5. Dawn Gateway LP and the Landowners agree that the Bickford Dawn portion of the Dawn Gateway pipeline shall be constructed in accordance with the terms and conditions of the Letter of Understanding ("LOU") attached hereto as Schedule 6 which has been amended to incorporate the following changes:

- a. S. 1 Add to first paragraph – Dawn Gateway LP shall provide the Landowner with a map of the location of the pipeline on their property (to be included as Appendix B-1 to this agreement) and if necessary the parties will identify and agree upon in Appendix B-2 to this agreement site specific measures which will need to be developed to address any property issues created by the construction of the pipeline.
- b. S. 1(o) In the 3<sup>rd</sup> paragraph after the 2<sup>nd</sup> sentence add – The drainage consultant and the landowner will meet to develop a tile plan which will be approved by the landowner, including installation of a tile on each side

of the easement to prevent standing water on the easement during construction if recommended by the drainage consultant.

- c. S. 1(w) Delete and insert – Dawn Gateway will restrict all construction activities to the permanent easement, temporary workspace and topsoil storage areas. Where additional lands are required for construction activities, Dawn Gateway shall enter into a further temporary workspace agreement with the landowner and compensate the landowner as per the Compensation Schedule attached to the EB-2009-0422 Minutes of Settlement dated as of February 5, 2010.
- d. S 5.1 Add – Dawn Gateway shall pay additional compensation in respect of property amenities (including, but not limited to, residences, barns, farm yards, tree rows, etc.) and non-agricultural land uses affected and, if agreement cannot be reached, the landowner reserves his or her right to arbitrate the amount of compensation.
- e. S. 6.2 Delete last sentence and add – The parties agree that Dawn Gateway LP will use Union Gas Limited's form of Integrity Dig Agreement (as next amended by Union Gas Limited in or about 2010-2011, and thereafter as amended and updated from time to time by Dawn Gateway LP in accordance with industry practice) for any integrity and maintenance operations to be undertaken on either the St. Clair portion or Bickford Dawn portion of the Dawn Gateway pipeline.
- f. S. 9 Add – Any further definition of the job description and role of the construction monitor is to be determined and agreed by GAPLO-Union (Dawn Gateway) and Dawn Gateway LP. The construction monitor will be a part of the construction team, report to the Joint Committee, and assist the construction team with the identification and resolution of issues. A mutually agreeable person will be selected to the role.
- g. Sch. 1 Joint Committee: Committee Make-up delete and insert – The Joint Committee will consist of the two representatives from the GAPLO-Union (Dawn Gateway), committee team and three representatives from Dawn Gateway. The construction monitor will attend any Joint Committee meetings and will be an advisor to the Joint Committee.
- h. Sch. 1 Joint Committee: Payment to Landowner Members delete and insert – The Company will pay, prior to construction, to each GAPLO-Union (Dawn Gateway) landowner who is a member of the Joint Committee at his or her direction a total payment of \$ 10,000 plus G.S.T. as an honorarium for their participation on the committee.

Site Specific Issues

6. With respect to the LOU amendment in paragraph 5 a. above, Dawn Gateway LP will provide landowners with individual property maps to be included in Appendix B-1. Some individual Landowners have already identified site specific issues created by the construction of the pipeline on their properties and Dawn Gateway LP has agreed to implement measures to mitigate the identified issues as indicated on Schedule 10. The matters specific to an individual Landowner set out in Schedule 10 will be included in Appendix B-2 to the LOU for that Landowner. Where necessary, Landowners and Dawn Gateway LP may identify additional site specific issues and agree upon their resolution to be added to Appendix B-2 of their LOU.

Compensation

7. Compensation for land rights, crop damage payments, and disturbance damages, for the Bickford Dawn portion of the Dawn Gateway pipeline easement shall be as set out in Schedule 7 attached hereto.

Costs

8. Dawn Gateway LP shall pay GAPLO-Union (Dawn Gateway)'s legal, consultant and negotiating committee costs to Cohen Highley LLP, in trust, as set out in Schedule 8 attached hereto.

Property Access

9. Each of the Landowners shall permit Dawn Gateway LP access to their properties to conduct any the activities listed in Schedule 9 which are related to the construction of the Bickford Dawn portion of the Dawn Gateway pipeline prior to the execution of the DGLP Easement by that Landowner, provided that such access shall be at a time convenient to that Landowner.

Withdrawal from DGLP's Application

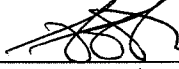
10. Each of the Landowners, GAPLO-Union (Dawn Gateway), and CAEPLA agree to withdraw from all further participation in the pending application by Dawn Gateway LP to the Ontario Energy Board for leave to construct the Bickford Dawn Pipeline and for approval of the regulatory framework and tariff for the transmission of gas on the Ontario portion of the Dawn Gateway Pipeline being proceeding EB-2009-0422.

Counterparts and Facsimile Transmission

11. This agreement may be executed in multiple counterparts, each of which shall be deemed an original hereof, and all of which shall constitute a single agreement effective as of the date hereof, and any delivery of an executed copy of this agreement by way of telecopy or facsimile shall constitute delivery hereof, provided that any party delivering by way of telecopy or facsimile shall, as soon as reasonably practicable, deliver the original executed copy to the other parties.

Dated as of February 5, 2010

Dawn Gateway Pipeline Limited  
Partnership by its general partner Dawn  
Gateway Pipeline General Partner Inc.



by: Stephen W. Baker  
Title: Co-President

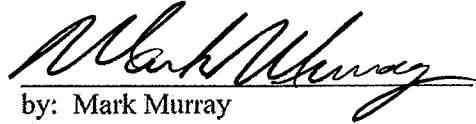


and by: Peter Cianci  
Title: Co-President

Canadian Association of Energy and  
Pipeline Landowner Associations,  
by its lawyer Paul Vogel

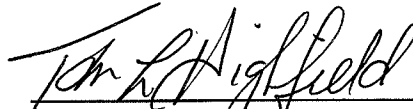
  
Paul Vogel

Union Gas Limited



by: Mark Murray  
Title: Manager, Regulatory Projects and  
Land Acquisition

GAPLO-Union (Dawn Gateway)



by: Tom Highfield  
Title: Chairman

and by: Paul Vogel, as lawyer for  
GAPLO-Union (Dawn Gateway)

  
Paul Vogel



## EASEMENT FOR TRANSMISSION PIPELINE

WHEREAS the Transferor is the owner in fee simple of those lands and premises more particularly described as

(hereinafter called the "Transferor's lands").

WHEREAS the Transferee has an interest in those lands and premises (hereinafter called the "Transferee's lands") situate, lying and being in the geographic Township of Dawn, now Township of Dawn-Euphemia, in the County of Lambton and Province of Ontario and being composed of PIN \_\_\_\_\_.

The Transferor (and the Mortgagee) do hereby GRANT, CONVEY, TRANSFER AND CONFIRM unto the Transferee, its successors and assigns, to be used and enjoyed as appurtenant to all or any part of the lands of the Transferee's lands the right, liberty, privilege and easement on, over, in, under and/or through a strip of the Transferor's lands more particularly described in Box 5 of page one of this Schedule (hereinafter referred to as the "Lands") to survey, lay, construct, maintain, inspect, patrol, alter, remove, replace, reconstruct, repair, move, keep, use and/or operate one pipeline for the transmission of pipeline quality natural gas as defined in the *Ontario Energy Board Act, 1998*, S.O. 1998 (hereinafter referred to as the "Pipeline") including therewith all such buried attachments, equipment and appliances for cathodic protection which the Transferee may deem necessary or convenient thereto, together with the right of ingress and egress at any and all times over and upon the Lands for its servants, agents, employees, those engaged in its business, contractors and subcontractors on foot and/or with vehicles, supplies, machinery and equipment for all purposes necessary or incidental to the exercise and enjoyment of the rights, privileges and easement hereby granted. The Parties hereto mutually covenant and agree each with the other as follows:

1 In consideration of the sum of 00/100 DOLLARS (\$) of lawful money of Canada (hereinafter called the "Consideration"), which sum is payment in full for the rights and interest hereby granted and for the rights and interest, if any, acquired by the Transferee by expropriation, including in either or both cases payment in full for all such matters as injurious affection to remaining lands and the effect, if any, of registration on title of this document and where applicable, of the expropriation documents, subject to Clause 12 hereof to be paid by the Transferee to the Transferor at least 30 days prior to the exercise by the Transferee of any of its rights hereunder other than the right to survey, the rights, privileges and easement hereby granted shall continue in perpetuity or until the Transferee, with the express written consent of the Transferor, shall execute and deliver a surrender thereof. Prior to and following such surrender Transferee shall remove all debris as may have resulted from the Transferee's use of the Lands from the Lands and in all respects restore the Lands to its previous productivity and fertility so far as is reasonably possible, save and except for items in respect of which compensation is due under Clause 2 hereof. As part of the Transferee's obligation to restore the lands upon surrender of its easement, the Transferee agrees to remove the Pipeline from the Lands. The Transferee and the Transferor shall surrender the easement and the Transferee shall remove the Pipeline where the Pipeline has been abandoned. The Pipeline shall be deemed to be abandoned where: a) corrosion protection is no longer applied to the Pipeline, or, b) the Pipeline becomes unfit for service in accordance with Ontario standards. The Transferee shall, within 60 days of either of these events occurring, provide the Transferor with notice of the event. Upon removal of the Pipeline and restoration of the Lands as required by this agreement, the Transferor shall release the Transferee from further obligations in respect of restoration. This provision shall apply with respect to all Pipelines in the Dawn-Trafalgar system on the Transferor's Lands.

2. The Transferee shall make to the Transferor (or the person or persons entitled thereto) due compensation for any damages to the Lands resulting from the exercise of any of the rights herein granted, and if the compensation is not agreed upon by the

Transferee and the Transferor, it shall be determined by arbitration in the manner prescribed by the *Expropriations Act*, R.S.O. 1990, Chapter E-26 or any Act passed in amendment thereof or substitution therefor. Any gates, fences, municipal drains, and tile drains interfered with by the Transferee shall be restored by the Transferee at its expense as closely as reasonably possible to the condition and function in which they existed immediately prior to such interference by the Transferee and in the case of tile drains, such restoration shall be performed in accordance with good drainage practice.

3. The Pipeline (including attachments, equipment and appliances for cathodic protection but excluding valves, take-offs and fencing installed under Clause 9 hereof) shall be laid to such a depth that upon completion of installation it will not obstruct the natural surface run-off from the Lands nor ordinary cultivation of the Lands nor any tile drainage system existing in the Lands at the time of installation of the Pipeline nor any planned tile drainage system to be laid in the Lands in accordance with standard drainage practice, if the Transferee is given at least thirty (30) days notice of such planned system prior to the installation of the pipeline; provided that the Transferee may leave the pipeline exposed in crossing a ditch, stream, gorge or similar object where approval has been obtained from the Ontario Energy Board or other Provincial Board or authority having jurisdiction in the premises. The Transferee agrees to make reasonable efforts to accommodate the planning and installation of future tile drainage systems following installation of the pipeline so as not to obstruct or interfere with such tile installation. The Transferee further agrees to make reasonable efforts at its own expense to accommodate changes in land use on lands adjacent to the easement for the purpose of ensuring the Pipeline is in compliance with all applicable regulatory requirements in connection with any such change in use.

4. As soon as reasonably possible after the construction of the Pipeline, the Transferee shall level the Lands and unless otherwise agreed to by the Transferor, shall remove all debris as may have resulted from the Transferee's use of the Lands therefrom and in all respects restore the Lands to its previous productivity and fertility so far as is reasonably possible, save and except for items in respect of which compensation is due under Clause 2 hereof.

5. The Transferee shall indemnify the Transferor for any and all liabilities, damages, costs, claims, suits and actions which are directly attributable to the exercise of the rights hereby granted, except to the extent of those resulting from the gross negligence or willful misconduct of the Transferor.

6. In the event that the Transferee fails to comply with any of the requirements set out in Clause 2, 3, or 4 hereof within a reasonable time of the receipt of notice in writing from the Transferor setting forth the failure complained of, the Transferee shall compensate the Transferor (or the person or persons entitled thereto) for any damage, if any, necessarily resulting from such failure and the reasonable costs if any, incurred in the recovery of those damages.

7. Except in case of emergency, the Transferee shall not enter upon any lands of the Transferor, other than the Lands, without the consent of the Transferor. In case of emergency the right of entry upon the Transferor's lands for ingress and egress to and from the Lands is hereby granted. The determination of what circumstances constitute an emergency, for purposes of this paragraph is within the absolute discretion of the Transferee, but is a situation in which the Transferee has a need to access the pipeline in the public interest without notice to the Transferor, subject to the provisions of paragraph 2 herein. The Transferee will, within 72 hours of entry upon such lands, advise the Transferor of the said emergency circumstances and thereafter provide a written report to Transferor with respect to the resolution of the emergency situation.

8. The Transferor shall have the right to fully use and enjoy the Lands except for planting trees over a six (6) metre strip centered over the Pipeline, and except as may be necessary for any of the purposes hereby granted to the Transferee, provided that without the prior written consent of the Transferee, the Transferor shall not with mechanical equipment or explosives excavate, drill, install, erect or permit to be excavated, drilled, installed or erected in, on, over or through the Lands any pit, well, foundation, pavement, building, mobile homes or other structure or installation. Notwithstanding the foregoing the Transferee upon request shall consent to the Transferor erecting or repairing farm fences, constructing or repairing his tile drains and domestic sewer pipes, water pipes, and utility pipes and constructing or repairing his lanes, roads, driveways, pathways, and walks across, on and in the Lands or any portion or portions thereof, provided that before commencing any of the work referred to in this sentence the Transferor shall (a) give the Transferee at least three (3) clear days notice in writing pointing out the work desired so as to enable the Transferee to evaluate and comment on the work proposed and to have a representative inspect the site and/or be present at any time or times during the performance of the work, (b) shall follow the instructions of such representative as to the performance of such work without damage to the Pipeline, (c) shall exercise a high degree of care in carrying out any such work and, (d) shall perform any such work in such a manner as not to endanger or damage the Pipeline as may be required by the Transferee.

9. The rights, privileges and easement herein granted shall include the right to install, keep, use, operate, service, maintain, repair, remove and/or replace in, on and above the Lands any valves and/or take-offs subject to additional agreements and to fence in such valves and/or take-offs and to keep same fenced in, but for this right the Transferee shall pay to the Transferor (or the person or persons entitled thereto) such additional compensation as may be agreed upon and in default of agreement as may be settled by arbitration under the provisions of the *Ontario Energy Board Act, 1998*, S.O. 1998, or any Act passed in amendment thereof or substitution therefor. The Transferee agrees to make all reasonable efforts to locate such facilities adjacent to lot lines and public road allowances. The Transferee shall keep down weeds on any lands removed from cultivation by reason of locating any valves and/or take-offs in the Lands.

10. Notwithstanding any rule of law or equity and even though the Pipeline and its appurtenances may become annexed or affixed to the realty, title thereto shall nevertheless remain in the Transferee.

11. Neither this Agreement nor anything herein contained nor anything done hereunder shall affect or prejudice the Transferee's rights to acquire the Lands or any other portion or portions of the Transferor's lands under the provisions of the *Ontario Energy Board Act, 1998*, S.O. 1998, or any other laws, which rights the Transferee may exercise at its discretion in the event of the Transferor being unable or unwilling for any reason to perform this Agreement or give to the Transferee a clear and unencumbered title to the easement herein granted.

12. The Transferor covenants that he has the right to convey this easement notwithstanding any act on his part, that he will execute such further assurances of this easement as may be requisite and which the Transferee may at its expense prepare and that the Transferee, performing and observing the covenants and conditions on its part to be performed, shall have quiet possession and enjoyment of the rights, privileges and easement hereby granted. If it shall appear that at the date hereof the Transferor is not the sole owner of the Lands, this Indenture shall nevertheless bind the Transferor to the full extent of his interest therein and shall also extend to any after-acquired interest, but all moneys payable hereunder shall be paid to the Transferor only in the proportion that his interest in the Lands bears to the entire interest therein.

13. In the event that the Transferee fails to pay the consideration as hereinbefore provided, the Transferor shall have the right to declare this easement canceled after the expiration of 15 days from personal service upon the Secretary, Assistant Secretary or Manager, Lands Department of the Transferee at its Executive Head Office in Chatham, Ontario, (or at such other point in Ontario as the Transferee may from time to time specify by notice in writing to the Transferor) of notice in writing of such default, unless during such 15 day period the Transferee shall pay the said consideration; upon failing to pay as aforesaid, the Transferee shall forthwith after the expiration of 15 days from the service of such notice execute and deliver to the Transferor at the expense of the Transferee, a valid and registerable release and discharge of this easement.

14. All payments under these presents may be made either in cash or by cheque of the Transferee and may be made to the Transferor (or person or persons entitled thereto) either personally or by mail. All notices and mail sent pursuant to these presents shall be addressed to the Transferor at \_\_\_\_\_ and to the Transferee at Dawn Gateway Pipeline Limited Partnership c/o Union Gas Limited, 50 Keil Drive North, Chatham, Ontario N7M 5M1, Attention: Manager, Lands or to such other address in either case as the Transferor or the Transferee respectively may from time to time appoint in writing.

15. The rights, privileges and easement hereby granted are and shall be of the same force and effect as a covenant running with the land and this Indenture, including all the covenants and conditions herein contained, shall extend to, be binding upon and enure to the benefit of the heirs, executors, administrators, successors and assigns of the Parties hereto respectively; and, wherever the singular or masculine is used it shall, where necessary, be construed as if the plural, or feminine or neuter had been used, as the case may be. The Transferee shall not assign this agreement without prior written notice to the Transferor and, despite any such assignment, the Transferee shall remain liable to the Transferor for the performance of its responsibilities and obligations hereunder.

16. The Transferor hereby acknowledges that this transfer will be registered electronically and the Transferor hereby authorizes the Transferee to complete the registration of this transfer.

17. The Mortgagee on Mortgage/Charge Number \_\_\_\_\_, in consideration of the sum of Two Dollars ( \$ 2.00 ) the receipt whereof is hereby acknowledged, joins herein for the purpose of consenting hereto and agrees to the easement hereby granted and covenants that the Transferee shall have quiet possession of the rights, privileges and easements hereby granted. The Mortgagee certifies that the Mortgagee is at least eighteen years old.

( Name of Mortgagee )

Witness:

(Per: \_\_\_\_\_)

Date of Signature \_\_\_\_\_

(Per: \_\_\_\_\_)

Date of Signature \_\_\_\_\_

“ I/We have authority to bind the corporation ”

Municipality of Chatham-Kent

Province of Ontario

DECLARATION REQUIRED UNDER  
SECTION 50 OF *THE PLANNING  
ACT*, R.S.O. 1990, as amended

I, Beverly Howard Wilton, of the Municipality of Chatham-Kent, in the Province of Ontario.

DO SOLEMNLY DECLARE THAT

1. I am Manager, Lands Department of Union Gas Limited which is acting as the project developer for Dawn Gateway Pipeline Limited Partnership which is the Transferee in the attached Grant of Easement, and as such I have knowledge of the matters herein deposed.
2. The use of or right in the land described in the said Grant of Easement is being acquired by Dawn Gateway Pipeline Limited Partnership for the purpose of a hydrocarbon transmission line within the meaning of part VI of the *Ontario Energy Board Act, 1998*.

AND I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath, and by virtue of the *Canada Evidence Act*.

DECLARED before me at the )  
Municipality of Chatham-Kent, )  
in the Province of Ontario )  
this day of , 2010 )

\_\_\_\_\_

\_\_\_\_\_  
A Commissioner, etc.

**LETTER OF UNDERSTANDING  
FOR LANDOWNERS ON THE PROPOSED  
NPS 24 BICKFORD DAWN LOOP OF THE DAWN GATEWAY PIPELINE**

INTRODUCTION

It is the policy of Dawn Gateway Pipeline Limited Partnership (the "Company" or "Dawn Gateway LP") that landowners affected by its pipeline projects be dealt with on a consistent basis that is fair to both parties. This Letter of Understanding represents the Company's commitment to that objective by providing a common framework within which negotiations for this project can take place. Dawn Gateway LP will therefore observe the following guidelines in its dealings with landowners on the NPS 24 Bickford Dawn loop of the Dawn Gateway Pipeline ("the project").

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The following matters are addressed in this Letter of Understanding and its appendices and schedules all of which form a part hereof.

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1. PIPELINE CONSTRUCTION PROCEDURES

Prior to construction, Dawn Gateway LP's project manager or designated agent shall visit with each affected landowner to review the timing of construction and discuss site specific issues and implementation of mitigation and rehabilitation measures in accordance with the provisions of this agreement.

(a) Prior to installing the pipeline in agricultural areas, the Company will strip topsoil from over the pipeline trench and adjacent subsoil storage area. All topsoil stripped will be piled adjacent to the easement and temporary land use areas in an area approximately 10 metres (33') in width. The topsoil and subsoil will be piled separately and Dawn Gateway LP will exercise due diligence to ensure that topsoil and subsoil are not mixed. If requested by the landowner, topsoil will be ploughed before being stripped to a depth as specified by the landowner.

The Company will strip topsoil across the entire width of the easement at the request of the landowner, provided also that a temporary right to use any necessary land for topsoil storage outside the easement is granted by the landowner.

Further, if the landowner so requests the Company will not strip topsoil with the topsoil/subsoil mix being placed on the spoil side of the easement on top of the existing topsoil.

At the request of a landowner a mulch layer will be provided between the existing topsoil and the stripped topsoil pile in situations where a crop is not present.

At the landowner's request, separation of distinct subsoil horizons such as blue and yellow clays shall be performed. Blue clays will be removed from the easement lands.

(b) The Company agrees to stake the outside boundary of the work space which will include easement, temporary work room, or topsoil storage areas. Where topsoil is to be stored off easement, the stakes will not be removed during the stripping operation. The stakes will be located at 30 metre (98.4 foot) intervals prior to construction. The intervals or distance between stakes may decrease as deemed necessary in order to maintain sight-lines and easement boundaries in areas of sight obstructions, rolling terrain or stream and road crossings. The Company will re-stake the easement limit for post construction tile work at the request of the landowner.

(c) On present and proposed agricultural lands, the Company will undertake appropriate survey techniques to establish pre-construction and post-construction grades with the view to restoring soils to pre-construction grade as reasonably practicable.

(d) The Company will ensure all construction practices and appropriate environmental mitigation measures will be followed to ensure a proper clean up.

(e) Whenever possible, all vehicles and equipment will travel on the trench line.

(f) The Company will not open more than 6.0 km. of trench line at a time.

(g) The Company will install the pipeline with a minimum of 1.2 metres of coverage. If the Company, acting reasonably, determines in consultation with the landowner and drainage expert that it is necessary to increase the depth of the Pipeline to accommodate facilities such as drainage, processes such as deep tillage, heavy farm equipment or land use changes, the Company will provide for additional depth of cover.

(h) At the request of the landowner topsoil will be over-wintered and replaced the following year. In these circumstances the Company will replace the topsoil such that the easement lands are returned to surrounding grade.

(i) During trench backfilling the Company will remove any excess material after provision is made for normal trench subsidence. The landowner shall have the right of first refusal on any such excess material. If trench subsidence occurs the year following construction, the following guidelines will be observed :

- (i) 0 to 4 inches - no additional work or compensation.
- (ii) Greater than 4 inches - the Company will strip topsoil, fill the depression with subsoil and replace topsoil. If it is cost effective the Company will repair the settlement by filling it with additional topsoil.

If mounding over the trench persists the year following construction, the following guidelines will be observed :

- (i) 0 to 4 inches - no additional work or compensation.
- (ii) Greater than 4 inches the Company will strip topsoil, remove excess subsoil and replace topsoil
- (iii) Should adequate topsoil depth be available, the mound can be levelled at the request of the Landowner

If the construction of the pipeline causes a restriction of the natural surface flow of water, due to too much or not enough subsidence, irrespective of the 4" level stated above, the Company will remove the restriction by one of the methods described above.

(j) If following over-wintering of the topsoil, return to grade and the establishment of a cover crop, there is identifiable subsidence in excess of 2 inches the Company will restore the affected area to grade with the importation of topsoil.

(k) The Company will also pick stones prior to topsoil replacement. The subsoil will be worked with a subsoiling implement, as agreed by the Company and the Landowner Committee. After topsoil replacement, the topsoil will be tilled with an implement(s) as agreed by the Company and the Landowner Committee. Stones 50 mm (2") in diameter and larger will be picked by hand and/or with a mechanical stonepicker. The subsoil on the easement will be tilled again as above.

(l) At the request of the landowner, the Company agrees to retain an independent consultant to carry out tests along the pipeline to monitor soils and crop productivity. As part of this testing, a soil specialist will conduct comparative compaction testing of the subsoils and NPK (nitrogen, phosphorus, potassium) testing and testing of PH levels on and off easement after construction. Global Positioning System (GPS) equipment may be used to identify all test locations. The Company further agrees to implement all commercially reasonable measures, where recommended by the soil specialist to remediate the soil.



(m) After the topsoil replacement, the topsoil will be tilled (see paragraph 1(k)) and stones picked. If requested by the landowner, the Company will cultivate the topsoil or make compensating arrangements with the landowner to perform such work. This request by the landowner must be made during the pre-construction interview in order to be co-ordinated with the construction process. After cultivation, the Company will pick stones again. If requested by the landowner, the Company will return in the year following construction and chisel plough or cultivate to the depth of the topsoil. When necessary to accommodate planting schedules, the landowners should perform cultivating and/or chisel ploughing themselves at the Company's expense, provided the need for this work has been agreed upon in advance ( see Schedule of Rates attached ).

(n) All subsoils from road bores will be removed.

(o) The Company will repair and restore all field drainage systems and municipal drains impacted by construction to their original performance and will be responsible for remedy, in consultation with the landowner, of any drainage problem created by the existence of the pipeline. The Company will be responsible for any defects in the integrity and performance of tile installed or repaired in conjunction with construction, operation or repair, provided the defects are caused by the Company's activities, faulty materials or workmanship. The Company guarantees and will be responsible forever for the integrity and performance of such tile as well as any other drain tile or municipal drain compromised by the Company's activities, including future maintenance operations and problems caused by the Company's contractors, agents or assigns. Where the landowner, acting reasonably, believes that there may be a drainage problem arising from the Company's operations, the Company will perform an integrity check on any tile construction/repair crossing the pipeline, and repair any deficiencies to the landowner's satisfaction.

All installations may be inspected by the landowner or his/her designate prior to backfilling where practicable. The Company will provide the landowner or his/her designate advance notice of the tile repair schedule.

The Company will retain the services of a qualified independent drainage consultant (the "Drainage Consultant"). The Drainage Consultant will work with landowners to develop plans and installation methods and, if the plan is implemented, the consultant will certify that the construction accords with the plan. The Drainage Consultant and the landowner will meet to develop a tile plan which will be approved by the landowner, including installation of a tile on each side of the easement to prevent standing water on the easement during construction if recommended by the drainage consultant. If prior to construction the Company is provided with these plans prepared by the Drainage Consultant and approved in writing by the landowner, the Company will install tile along the pipeline in the following situations:

1. If recommended by the Drainage Consultant in areas of numerous random tiles or systematic tiles that cross the pipeline easement, the Company will install header tiles (interceptor drains) adjacent to the easement as laid out in the plans. The downstream end of cut tile will be plugged. Such work will occur as soon as practicable, but prior to topsoil stripping operations. Any intercepted drains will be connected or plugged. The Company will attempt to minimize the number of tile crossing the pipeline easement.

2. In areas where drainage problems will be created as a result of the easement, the Drainage Consultant will develop a tile plan to mitigate these impacts provided that the landowner is agreeable to any works required for this installation.
  
3. Should the pipeline construction program clear lands adjacent to existing pipelines and as a result create a newly cleared area large enough to farm, the Company will, at the request of the landowner, develop a tile plan to drain the said area. The Company will install the tile in the newly cleared area, and install a drainage outlet that will enable the implementation of the said tile plan provided the cost of such work does not exceed the present value of the net crop revenue from the said area. The present value shall be calculated using the same crop value and discount rate used in the one time crop loss compensation calculation. The net crop revenue shall be derived by reducing the crop value by a negotiated input cost. The Company will accept drainage design solutions that include the use of a motorized pump, if the landowner releases the Company from all future operation and maintenance responsibilities for said pump. The Company will accept drainage design solutions that include outlet drains crossing adjacent properties, if the landowner obtains necessary easements or releases fully authorizing said crossings.
  
4. Drainage laterals will be installed after construction of the pipeline to provide easement drainage. Lateral and cross-easement tiles will be installed in the construction year as weather permits.
  
5. Other areas recommended by the Drainage Consultant.

If random tiles are encountered during construction they will be staked and capped, unless temporary piping is installed to maintain flow.

The Company will do the following to accommodate planned and future drainage systems in the Company's drainage and pipeline design. The Company will incorporate any professionally designed drainage plans obtained by the landowner for future installation. If the landowner intends to install or modify a drainage system but has not yet obtained professionally designed plans, the Company will hire a drainage consultant to develop an Easement Crossing Drainage Plan in consultation with the landowner.

In areas where topsoil has been stripped, and at the request of the landowner, the Company will complete post-construction tile installation and repairs prior to topsoil replacement.

The installation of tile shall be performed by a licensed drainage contractor. The Company will consult with the landowner committee and mutually develop a list of acceptable tile drainage contractors to be used during construction.

Header tiles will be installed using a trench method to ensure that all field tile are located and connected as required by the tile plan.

The Company will provide the landowner with the most recent specifications concerning tile support systems for existing tile across the trench. The method of support will be agreed upon between the landowner and the Drainage Consultant during the pre-construction visit.

The Company will provide the landowner with a copy of as-built drainage plans.

(p) Company will, unless otherwise agreed to with the landowner, ensure any water which may accumulate on the easement during construction will be released into an open drain or ditch, but not in a tile drain. This may, however, be accomplished through the installation of temporary tile. The Company will provide the landowner with a proposed temporary tiling plan for review. If the Company pumps into an existing tile with the landowner's permission, the water will be filtered.

(q) The Company shall replace or repair any fences which are damaged by pipeline construction in a good and workmanlike manner. In addition, the Company will reset any survey monuments which are removed or destroyed during pipeline construction.

(r) It is understood that the Company is required to adhere to all of the conditions set out in the Leave to Construct Order of the Ontario Energy Board and that the foregoing are additional undertakings that the Company has agreed upon with the landowners on the project. A copy of the conditions will be mailed to each landowner as soon as it is available.

(s) The landowner will execute a Clean-up Acknowledgment when he/she is satisfied with the clean-up operations described in Paragraph 1, (h) through (q). It is suggested that any tenant(s) who are affected by construction accompany the landowner to inspect the clean-up prior to execution of the Clean-up Acknowledgment. The Landowner Committee will be provided, for review, the form of documents required for landowner execution.

(t) Where private water or utility lines are planned to be interrupted, the Company will supply temporary service to the affected landowners prior to service interruption. In the case of accidental interruption, temporary services will be provided by the Company at the earliest possible opportunity.

(u) Where requested by the landowner, the Company will leave plugs for access across the trench to the remainder of the landowner's property during construction. Following construction, the Company shall ensure that the landowner shall have access across the former trench area and easement. Upon request of the landowner, the Company shall create a gravel base on filter fabric across the plug(s) and will remove same at the further request of the landowner.

(v) The Company, including its employees, agents, contractors and sub-contractors, will not use any off-easement culverts incorporated into Municipal Drains to provide access to the easement. Further, the Company will not use any laneway or culvert of the landowner without the landowner's prior written consent. In the event of such use, the Company will, at its own expense, repair any damage and compensate the landowner accordingly. The Company agrees to monitor and maintain private driveways that cross the easement for a period of 18 months after construction.

(w) The Company will restrict all construction activities to the permanent easement, temporary workspace and topsoil storage areas. Where additional lands are required for construction activities, the Company shall enter into a further temporary workspace agreement with the landowner and compensate the landowner as per the Compensation Schedule attached to the EB-2009-0422 Minutes of Settlement dated as of February 5, 2010.

(x) The Company's Landowner Complaint Tracking system shall be available to landowners for the proposed construction.

(y) The Company shall pay the costs of independent consultants satisfactory to both the landowner and the Company to resolve site specific disputes involving affected lands on a binding basis concerning the following:

- (i) The need for topsoil importation as in Clauses 1 i) hereof, respecting the existence of identifiable subsidence,
- (ii) The need for topsoil importation as in Clause 1 (z) hereof, respecting the establishment of crop losses in excess of 50%,
- (iii) The establishment of levels of compensation for specialty crops as in clause 5.2 hereof.
- (iv) resolution of future crop loss claims under s.5.2 (a) hereof.

In addition, in the event that a dispute arises between a landowner and the Company and such dispute cannot be resolved to the mutual satisfaction of the parties through discussion or referral to the joint committee established pursuant to paragraph 1(dd) below and Schedule 1 hereof, the Company may retain a mutually satisfactory independent consultant to assist in the resolution of the particular dispute.

(z) The Company will import 3 inches of topsoil to remedy any areas affected by construction that have crop losses in excess of 50 % in the fifth year following construction to be distributed in accordance with the following protocol regardless of the cause of the loss and without prejudice to the landowner's continuing right to compensation for losses in excess of those compensated for.

- (i) The Company will regrade the total width of the easement, including the designated area to level any ruts;
- (ii) The Company will import a quantity of topsoil equivalent to three (3) inches times the total area of the Land experiencing greater than 50% crop loss (the "affected area"). The topsoil will be of a quality described in paragraph 1(bb) below, dry and tested for the presence of soybean cyst nematode;
- (iii) The Company will spread the imported topsoil uniformly over the affected area to a maximum depth of three (3) inches on the affected area or as otherwise agreed to by the Landowner and the Company in a manner so as to not adversely affect the natural drainage of the Land or adversely impact on normal farming operations.

Alternatively, at the option of the landowner, if there is greater than 50% crop loss after five years, the Company will retain an independent soils consultant satisfactory to both parties to develop a prescription to rectify the problem. This may include the importation of topsoil.

(aa) The Company will perform compaction testing on and off the easement before and after topsoil replacement and provide the results to the landowner. Unless there is an agreement to the contrary, the Company will remediate any residual compaction in the subsoil prior to return of topsoil.

(bb) Any imported topsoil shall be natural, cultivated, medium loam, neither clay or sandy in nature, capable of heavy agricultural growths and be from a source approved by the landowner.

(cc) The Company will provide a copy of this Letter of Understanding and the environmental reports to the construction contractor.

(dd) The Company agrees to implement one joint committee for the NPS 24 Bickford Dawn pipeline under the terms of reference agreed to in Schedule 1 hereof.

(ee) The Company will ensure suitable passage and land access for agricultural equipment during construction.

(ff) Dawn Gateway LP shall provide the landowner with a map of the location of the pipeline on their property (to be included as Appendix B-1 to this agreement) and if necessary the parties will identify and agree upon in Appendix B-2 to this agreement site specific measures which will need to be developed to address any property issues created by the construction of the pipeline.

## 2. LIABILITY

The Company will be responsible for damages to property, equipment, and loss of time resulting from construction operations, and will pay for repairs or replacement costs. The Company will be responsible, and indemnify the landowner from any and all liabilities, damages, costs, claims, suits and actions except those resulting from the gross negligence or wilful misconduct of the landowner.

## 3. WATER WELLS

To ensure that the quality and quantity (i.e. static water levels) of well water is maintained, a pre, during and post construction monitoring program will be implemented for all drilled wells within 100 metres of the proposed pipeline, for all dug wells within 100 metres and for any other wells recommended by the Company's hydrogeology consultant. All samples will be taken by the Company's environmental personnel and analyzed by an independent laboratory. Their report will be made available to the landowner on or before the filing of the final post-construction monitoring report.

Should a well be damaged (quantity and/or quality) from pipeline installation/operations, a potable water supply will be provided and the water well shall be restored or replaced as may be required.

4. LAND RIGHTS

Land rights required for the pipeline construction include permanent interests such as pipeline easements (i.e. a limited interest in the affected lands) and may also include temporary land use agreements. The Company agrees that it will not surrender any of its permanent rights or be released from any of its obligations in the easement lands unless an agreement to the contrary has been made with the landowner. In making payment for land rights directly to the registered owner of the affected lands, the owner is responsible to ensure his/her tenant is aware of the terms of the easement or temporary land use agreement and this Letter of Understanding.

Consideration for land rights will be based on appraised market value of the affected lands. In determining the appraised market value, independent accredited real estate appraisers are retained by the Company who must observe the standards established by the Appraisal Institute of Canada. If agreement on the consideration for land rights cannot be reached, the Company will pay for a second report by a qualified appraiser who is chosen by the landowner provided the appraiser and the terms of reference for the appraisal report are mutually acceptable to the landowner and the Company. If consideration for land rights still cannot be agreed upon, the matter would be determined at a compensation hearing and the Company's offers would not prejudice either parties' presentation at the hearing.

4.1 EASEMENTS

Pipeline easements convey a limited right in an owner's land for the construction, operation, maintenance and repair of a pipeline. The owner retains title to the right-of-way lands with a restricted right to use the easement. The Company will pay a consideration for easements based upon 100% of the appraised market value of the lands required which includes a premium as an incentive for settlement. Payments for easements will be made in one lump-sum or will be amortized over 10 years using the current Canada Savings Bond (CSB) rate, at the option of the landowner.

4.2 TEMPORARY LAND USE AGREEMENTS

Consideration is also paid for temporary use of landowners' property required in connection with the project. This lump sum payment for use of these lands is based upon 50% of the appraised market value for agricultural lands. Payment for Disturbance damages will also be made on the basis of 50 percent of the values described in 5.1 below and Appendix "A" hereto. The Comparative Crop Option and One Time Payment with Cover Crop Option 5.2 below is available for temporary land use lands in agricultural areas. For non-agricultural or development lands, an annual payment is offered based on the market value multiplied by the current CSB rate. Temporary land use will be required for at least a two year period, being the year of construction and the following year to allow for clean-up and restoration activities. Should activities extend beyond the two year period, payment will be negotiated on an annual basis. Although every effort will be made by the Company to identify temporary land use areas required, in certain instances either before or during construction, additional temporary land use may be identified and compensation will be as outlined above.

Temporary land use payments do not include those lands used for top soil storage adjacent to the right-of-way for which compensation will be paid as set out in Appendix A

5. DAMAGE PAYMENTS

Compensation for damages can be grouped under two headings, namely, Disturbance Damages, and Construction Damages. Disturbance and Construction damage payments will apply to both easement and temporary land use and will be based upon the areas of the proposed pipeline easement and temporary land use.

5.1 DISTURBANCE DAMAGES

Disturbance Damages are intended to recognize that pipeline construction will result in some unavoidable interference with active agricultural operations and certain other uses of affected lands. This may include lost time due to negotiations and construction, inconvenience to the farming operations, restricted headlands, interrupted access, extra applications of fertilizer, temporary storage of top soil off easement. Other land uses may qualify for Disturbance Damages which are site-specific in nature and recognize the particular circumstances of the use being interfered with. The Company will negotiate with the affected owner to address these site-specific issues. Dawn Gateway LP shall pay additional compensation in respect of property amenities (including, but not limited to, residences, barns, farm yards, tree rows, etc.) and non-agricultural land uses affected and, if agreement cannot be reached, the landowner reserves his or her right to arbitrate the amount of compensation.

5.2 CONSTRUCTION DAMAGES

(a) CROP DAMAGE

There are two options available to landowners for compensation of crop damage. A Comparative Crop Program, or a One Time Payment program with a Cover Crop Option. These are described below.

OPTION ONE: Comparative Crop Program

In the "Comparative Crop Program" the Company will monitor crop yields on and off right-of-way to compensate for any reduction in yield which is attributable to the pipeline construction and any related effects ( i.e. thermal effect ) and will follow a damage claim settlement program as follows:

First Year (Construction Year) - Pay 100% of crop damage on all permanent and temporary easements, topsoil storage areas, gored areas and adjoining affected lands.

Second to Fifth Year - The crop loss compensated applies only to easements and temporary land use areas. It will be based on results obtained from a consulting agronomist retained by the Company; any other testing must be approved by the Company . The agronomist will determine any difference in crop yields on and off the easement/temporary land use areas (percent crop loss) and the Company will compensate for such crop losses at prevailing rates.

Sixth Year - In the sixth year, at the landowner's discretion in consultation with the Company, the "Comparative Crop Program" may remain in effect, or the landowner may offer to accept a lump sum payment from the Company, and the landowner will sign a Full and Final Release. The lump sum payment will be the sixth year percent crop loss plus net present value of future years' losses. Net present value of future years' losses will be based on the percent crop loss in the sixth year multiplied by the average price per acre on crops grown in the prior six (6) year period divided by the current CSB rate. For example:

Present Value = Payment / Interest

Thus, Lump Sum =

(Sixth Year % Crop Loss) +

$$\frac{(\% \text{ Crop Loss} \times \text{Average Crop Price Per Acre} \times \text{Acreage})}{\text{CSB Rate}}$$

Example: 20% crop loss over 1 acre area; average crop price \$300/acre

$$(.20 \times \$300.00 \times 1.0) + \frac{.20 \times \$300.00 \times 1.0}{.105} = \$631.43 \text{ (Lump Sum Payment)}$$

It is understood and agreed that landowners will use good farming practices in the cultivation of their lands to mitigate any ensuing damages to the best of their ability. The Company will provide crop restoration recommendations following the completion of construction to assist landowners in rehabilitating the affected lands and will compensate them for any expenses over and above normal farm management of the easement while carrying out these recommendations. Where a landowner has followed these recommendations to the best of their ability, and is still participating in the "Comparative Crop Program" the Company will, at its expense, retain agricultural specialists to offer advice and assistance in restoration procedures.

If the landowner chooses the Comparative Crop Program, the Company will also monitor and compensate for any decrease in the price obtained for the whole field crop as a result of differences in grade, quality, condition or moisture content between the crop on the right-of-way and the crop on the landowner's property that is off the right-of-way, but this provision shall not apply if the One Time Payment Program is chosen.

Pasture Lands - If the affected lands are being used for pasture, the landowner may wish to select the following option in lieu of the 5 year crop monitoring described above. Any unbroken pasture area involved will be reseeded by the Company or on mutual agreement, by the landowner who will be compensated for the reseeding. Pasture area will be paid at 100% loss for a two year term, being the construction year and the year following construction to allow the affected area to establish growth. At the end of the two year period, if the pasture has been established, a Full and Final release will be requested from the landowner. If the pasture has not yet been established, compensation will continue to be paid at 100% loss until such time as the pasture has been established, at which time a Full and Final Release will be signed by the landowner.

#### OPTION TWO: One Time Payment With Cover Crop Option

As an alternative to the foregoing damage programmes, the Company will offer landowners a one-time settlement on the area of the permanent easement and temporary land use areas, for a Full and Final Release on future crop loss, trees, stone picking beyond the year following construction, cover crops, inspection, consulting time and general damages of any nature whatsoever. Payment is normally made after construction but can be made at the time easement agreements are executed. Notwithstanding that the landowner will have executed a Full and Final Release for crop damages either before or after construction, should productivity loss exceed the percentages paid through the "One Time" Program in any year following construction and the landowner has not been (or is not being) compensated for crop loss under the terms of an existing crop loss compensation program with



the Company, the Company will reimburse the landowner for the difference calculated by applying the percentage loss to the landowner's actual gross return in the year and deducting the compensation received for that year under the " One Time " program. It will be incumbent upon any landowner making this type of claim to advise the Company in sufficient time to allow for investigation of the matter and completion of the required samplings. Alternatively, at the option of the Landowner, upon provision of advance notice to the Company to permit opportunity for inspection, GPS data may be utilized to establish yield reductions for the purpose of any applicable " top up ", provided that the Company is not responsible for installing GPS units or survey equipment if necessary. In the event that the landowner selects this option, the landowner must provide all necessary GPS documentation related to the entire farm field in question, including, but not limited to, maps, computer print-outs and formula to determine field averages.

Example Third year crop loss under "One Time" Program = 50%.

Actual crop loss following investigation and sampling = 60%.

Difference payable to landowner - 10%).

For any land used outside the permanent easement, the Company will pay 100% damages for any crops destroyed during the construction year and pay damages for future crop loss on an "as incurred" basis.

This option does not apply to specialty crops. Damages to specialty crops, i.e. tobacco, produce, registered seed variety, will be reviewed and compensation negotiated on a site specific basis and paid on a yearly basis as a specialty crop rotation.

In addition to the one time payment, the landowner may request a cover crop rehabilitation program for cultivated lands. Under this program the landowner will plant alfalfa/sweet clover or other restoration crops approved by the Company on the easement and his/her normal crop in the remainder of the field for up to three years. The initial cost of tillage and planting will be paid by the Company as determined by "Economics Information", published by the Ministry of Agriculture and Food. The cost of seed planted over the easement will be compensated upon presentation of an invoice for same. This cover crop program does not apply for tobacco crops.

**(b) WOODLOTS AND HEDGEROW TREES**

All woodlots and hedgerow trees to be cut will be appraised by a qualified forester retained by the Company. The forester will contact the landowner before entry on their property. Copies of appraisal reports will be made available to affected landowners and payment will be made in accordance with the reports.

If requested by the landowner, evaluation of trees in woodlots will be based on the accepted practice as outlined on Schedule 1 hereto.

The evaluation of trees for aesthetic values, will be carried out by qualified professionals according to standard principles as outlined in Schedule 2 hereto. Compensation for trees evaluated in this manner shall be set out in Appendix "B" to this document.

The Company reserves the right to use trees for which it has paid compensation. At the landowner's request, any remaining logs will be cut into 10 foot ( 3.05 metre ) lengths, lifted and piled adjacent to the easement.

As an alternative to the forester's appraisal, the landowner may accept "Option Two: One Time Payment With Cover Crop Option " (see page 11-12) in lieu of the woodlot evaluation.

Tree plantations (Christmas trees and nursery stock) will be appraised separately.

Prior to the start of construction, the following options will be discussed with the landowner, and the most appropriate option selected:

Option 1: The land will be completely cleared for construction with all stumps and brush removed so that the land can be cultivated.

Option 2: At the Company's expense, all vegetation on the construction area will be cut with brush cutters or sprayed regularly so that brush or trees will not grow again.

Option 3: The Company will maintain a 6 metre strip over the pipeline which will be kept clear by cutting the brush or spraying. The remainder of the easement will be allowed to reforest naturally or can be reforested by the landowner.

The Company has established a policy to replant twice the area of trees to those which are cleared for pipeline projects. Landowners whose woodlots are to be cleared may apply in writing to the Company should they wish to participate in this programme. Tree seedlings will be replanted on the right-of-way or within the landowner's property using species determined in consultation with the landowner. Replanting must be done in accordance with the Company's policies regarding tree planting on easements so that a 6 metre strip centred on the pipeline is left open for access to the pipeline.

For hedgerows the Company will implement the following practice: If a tree in excess of six ( 6 ) feet is removed a six ( 6 ) foot replacement tree will be supplied; if a tree less than six ( 6 ) feet in height is removed, a similar sized tree will be supplied. The Company will warrantee such trees for a period of three years following planting, provided the landowner waters the tree as appropriate after planting.

The only exception to the non-planting of the 6 metre strip is that with permission, trees may be planted as a crop ( nursery stock ), provided that no tree is permitted to grow higher than 2 metres in height, and the species are of a shallow rooting variety. The use of hydraulic spades within the 6 metre strip is prohibited.

**(c) GENERAL MATTERS FOR DAMAGES**

As damage payments are made directly to the registered landowner, the landowner is responsible for making any compensation to his/her tenant for any matters included in the damage payment from the Company.

The Landowner(s) in consideration of this settlement, covenants and represents that this settlement and the relevant easement agreement or option for easement, as the case may be will be made known to any occupant, tenant or lessee of their lands.

Where damage settlements cannot be negotiated, the Company or the landowner may apply to the Board of Negotiation or Ontario Municipal Board to settle unresolved claims. It is further understood and agreed that the landowner's executing our easement, is without prejudice to his/her position in negotiation of damages following construction of the pipeline and the aforementioned settlement arrangements will be in full effect.

6. POST-CONSTRUCTION AND PIPELINE OPERATIONS ISSUES

6.1 WEED AND BRUSH CONTROL IN NON-CULTIVATED AREAS

The pipeline easement through woodlots will be brushed out on a regular basis either within a 6 metre strip centred over the pipeline or across the full width of easement which was initially cleared for construction. The width of clearing will be discussed with landowners prior to work commencing.

At the choice of the landowner, the easement can be replanted with trees provided no planting takes place within a 6 metre strip centred over the pipeline. Landowners are reminded that the Company must be notified five days prior to any excavation taking place on the easement and that such excavation must be under the direction of a Company inspector, in accordance with the easement agreement.

The Company will work with the Landowner to ensure that weeds are controlled along the pipeline. Weeds will be sprayed or cut after discussion with the landowner. The Landowner will be provided with a contact name in the event that concerns are experienced with weeds.

6.2 DAMAGES FROM PIPELINE OPERATIONS

Prior to scheduled excavation for maintenance work, top soil shall be stripped and piled separately from subsoil.

Pipeline maintenance shall be scheduled to accommodate crop planting, growing and harvesting, however, in the event maintenance work results in crop damage, the Company shall negotiate crop damage settlements.

Any work on existing pipelines will be carried out using current practices.

The parties agree that Dawn Gateway will use Union Gas Limited's form of Integrity Dig Agreement (as next amended by Union Gas Limited in or about 2010-2011, and thereafter as amended and updated from time to time by Dawn Gateway LP in accordance with industry practice) for any integrity and maintenance operations to be undertaken on either the St. Clair portion or Bickford Dawn portion of the Dawn Gateway pipeline.

6.3 ABANDONMENT

Upon the abandonment of the pipeline ( as determined by the Easement ) , the affected lands shall be returned as close as possible to its prior use and condition with no ascertainable changes in appearance or productivity as determined by a comparison of the crop yields with adjacent land where no pipeline was installed, provided that there shall be no additional compensation for crop loss to the landowner under the Comparative Crop Program 5.2 (a) OPTION ONE or the One-Time Payment with Cover Crop OPTION TWO but without prejudice to any continuing right of the landowner to " top up " compensation pursuant to the provisions of Section 5.2 (a) hereof.

The Company, in consultation with the landowner or third parties as required, will determine a reasonable and appropriate course of action to rectify any deficiencies.

6.4 DEPTH OF COVER

At the request of the landowner, the Company shall undertake a depth of cover survey of the Pipeline, and shall provide its findings to the landowner. Where it is determined that cover over the Pipeline is

less than three feet, The Company shall restore depth of cover to three feet with the importation of topsoil or by lowering the pipe.

**6.5 STONEPICKING**

The Company shall, at a time satisfactory to the landowner, pick stones 50 mm (2") or larger in diameter by hand/or with a mechanical stone picker in each of the first two years following construction. The Company shall, at a time satisfactory to the landowner, return to pick stones 50 mm (2") or larger in the following years where there is a demonstrable need.

**7. GORED LAND**

The Company agrees to pay landowners the 100 % annual crop loss component as provided in the One Time Payment with Cover Crop Option hereof, or in the case of specialty crops as provided in Clause 5.2 hereof for agricultural lands rendered not useable as a result of the construction of the pipeline and clean-up following construction.

**8. TESTING FOR SOYBEAN CYST NEMATODE**

In consultation with the landowner, the Company agrees to sample all agricultural easements along the pipeline route of this project, before construction, and any soils imported to the easement lands for the presence of soybean cyst nematode (SCN) and provide a report of test results to the landowner. In the event the report indicates the presence of SCN, the Joint Committee will work with OMAFRA and the University of Guelph to develop a best practices protocol to handle SCN when detected and will employ the most current best practice at the time of construction. The Company will also test for SCN whenever it is conducting post-construction soil tests.

**9. INDEPENDENT CONSTRUCTION MONITOR**

An independent construction monitor shall be appointed by Ontario Energy Board Staff, the Company and GAPLO-Union (Dawn-Gateway) which is a voluntary association consisting of landowners who have granted easements to the Company for the construction of the Dawn Gateway Pipeline. The monitor shall be on site continuously to monitor construction with respect to all issues of concern to landowners, and shall be available to the landowners and the Company at all times. The monitor shall file interim and final reports with the Ontario Energy Board. Any further definition of the job description and role of the construction monitor is to be determined and agreed by GAPLO-Union (Dawn Gateway) and Dawn Gateway LP. The construction monitor will be a part of the construction team, report to the Joint Committee, and assist the construction team with the identification and resolution of issues. A mutually agreeable person will be selected to the role..

**10. INSURANCE**

Upon request by the landowner, the Company will provide insurance certificates evidencing at least five million dollars in liability insurance coverage.

**11. COMPENSATION LEVELS**

The levels of compensation applicable to your property are set out in Appendix "A" and are based upon the criteria set out above. Kindly sign the second copy of this Letter of Understanding and initial all Appendices to indicate your acceptance of our arrangements.

12. ASSIGNMENT

All rights and obligations contained in this agreement shall extend to, be binding upon, and enure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto respectively; and wherever the singular or masculine is used it shall, where necessary, be construed as if the plural, or feminine or neuter had been used, as the case may be.

The Company shall not assign this agreement without prior written notice to the landowner and, despite such assignment, the Company shall remain liable to the landowner for the performance of its responsibilities and obligations in this agreement.

Yours very truly,  
Dawn Gateway Pipeline Limited  
Partnership

\_\_\_\_\_  
\_\_\_\_\_

Dated at \_\_\_\_\_, Ontario this \_\_\_\_\_ day  
of \_\_\_\_\_, 20\_\_\_\_\_.

Witness:

(  
( \_\_\_\_\_  
( Landowner  
(  
(  
( \_\_\_\_\_  
( Landowner

**NPS 24 Bickford Dawn Loop of Dawn Gateway Pipeline**

SCHEDULE 1

Landowner Relations and Terms of Reference of Joint Committee

*In addition to Wet Soils Shutdown issues*, the Joint Committee's purpose is to:

- i) provide a mechanism to address issues/concerns that arise during and following construction including concerns related to wet soil shutdown decisions made by the Company;
- ii) provide a brief overview of issues/concerns raised during and following construction; and,
- iii) consider which items should be included in a Post Construction Report.

The objective of the Joint Committee is to provide:

- i) a vehicle to address issues/concerns which arise during and following construction;
- ii) deal with any unforeseen circumstances which may arise during or following construction; and,
- iii) an opportunity for landowners to comment on how the Company might improve future construction practices.

In reviewing the foregoing, the types of issues which may be addressed are as follows:

- i) landowner concerns that arise during and following construction;
- ii) unusual or unanticipated impacts of the construction process which show up only after construction is completed;
- iii) methods of anticipating and avoiding these circumstances in the future; and,
- iv) review of ongoing construction practices and procedures which in the view of the landowners might be improved in future construction.

Duration of the Joint Committee

- i) The Joint Committee shall be formed during the year of construction in advance and prior to the commencement of construction. The landowners shall be responsible for recruiting the landowner members and advising the Company thereof. The Committee shall continue for a period of two ( 2 ) years from the date of commencement of construction and so long thereafter as the Committee determines is necessary.

Committee Make-Up

- i) The Joint Committee will consist of the two representatives from the GAPLO-Union (Dawn Gateway) committee team and three representatives from Dawn Gateway. The construction monitor will attend any joint Committee meetings and will be an advisor to the Joint Committee.

Payment to Landowner members

- i) The Company will pay, prior to construction, to each GAPLO-Union (Dawn Gateway) landowner who is a member of the Joint Committee at his or her direction a total payment of \$10,000 plus G.S.T. as an honorarium for their participation on the committee.

**NPS 24 Bickford Dawn Loop of Dawn Gateway Pipeline**

SCHEDULE 2

WOODLOT EVALUATION

At the time of signing of the Letter of Understanding the landowners with woodlots will be given 3 options.

1. take a one time full and final for the total easement.
2. take a one time full and final for that portion of the easement in agricultural land, and have the woodlot evaluated separately.
3. take the crop monitoring program and have the woodlot evaluated separately.

Woodlots will be assessed in the following manner:

A forestry consultant will cruise the woodlot to determine the amount of volume which could be harvested on a periodic basis from the woodlot under sustained yield management.

This volume will then be determined on an annual basis.

Current sale prices will then be given to this volume to determine an annual amount which could be harvested from the woodlot.

This value will then be present valued using the same formula as the one time payment option.

**NPS 24 Bickford Dawn Loop of Dawn Gateway Pipeline**

SCHEDULE 3

AESTHETIC TREE EVALUATION

The following procedure would be followed where a landowner wishes to have trees on his property evaluated for aesthetic values.

During discussions for the Letter of Understanding, the landowners would identify the trees he wishes to have evaluated for aesthetic purposes.

The Company would contract a qualified person to complete an evaluation of the trees.

The landowners would be paid the evaluated price for the trees in addition to other payments.

If trees are less than 5 inches in diameter replacement of the trees may be considered in lieu of a payment.

If the landowner disagrees with the Company's evaluation a second evaluation may be completed using the same criteria as the original evaluation.

EVALUATION CRITERIA

A four part evaluation criteria will be completed for aesthetic trees:

$$\begin{array}{rcccccc} \text{Tree} & = & \text{Basic} & \times & \text{Species} & \times & \text{Condition} & \times & \text{Location} \\ \text{Value} & & \text{Value} & & \text{Rating} & & \text{Rating} & & \text{Rating} \end{array}$$

Basic value is estimated without consideration of condition, species or location. It is calculated by multiplying the cross-sectional area of the tree trunk by an assigned value per square inch of trunk area. (in 1983 this value was \$22.00)

Species rating is a percentage rating based on the relative qualities of the tree species.

Condition rating is a percentage rating based on the health of the tree.

Location rating is a percentage rating based on the location of the tree.



SCHEDULE 4

Schedule of Rates for Work  
Performed by Owners of Land

Typically all work will be done by the Company. In the event that landowners perform work on behalf of the Company, at the Company's expense, the Company will remunerate the landowner in accordance with the following;

1. Stonepicking - \$10.00 per hour/per person picking by hand  
- \$45.00 per hour for use of tractor and wagon
2. Chisel Plowing - \$70.00 per hour
3. Cultivation - \$50.00 per hour
4. Tile Inspection - \$20.00 per hour \*

\* Payment for Tile Inspection is for those hours spent inspecting tile at the request of the contractor.

**NPS 24 Bickford Dawn Loop of Dawn Gateway Pipeline**

## SCHEDULE 5

## Wet Soils Shutdown

*The following sets out the Wet Soils Shutdown practice of the Company for pipeline construction, repair and maintenance on agricultural lands.*

Wet Soils Shutdown issues shall be decided by the Joint Committee with the assistance of the construction monitor as required.

While constructing the Company's pipeline the Company's senior inspectors inspect right-of-way conditions each day before construction activities commence for that day. If, in the judgment of these inspectors or other Company representatives and other members of the Joint Committee with the assistance of the construction monitor, the right-of-way conditions on agricultural lands are such that construction would have an adverse affect on the soils due to wet soils conditions, the contractor is prohibited from starting construction activities. The inspectors/other Company representatives and other members of the Joint Committee with the assistance of the construction monitor shall consider the extent of surface ponding, extent and depth of rutting, surface extent and location of potential rutting and compaction (i.e., can traffic be re-routed within the easement lands around wet area(s)) and the type of equipment and nature of construction proposed for that day. The wet soil shutdown restriction would be in effect until, in the judgment of the Company representatives and other members of the Joint Committee with the assistance of the construction monitor, the soils would have sufficiently dried to the extent that commencing construction activities would have no adverse affects on the soils.

Wet soils shutdown is a routine part of the Company's normal management process for pipeline construction activities. In recognition of this, the Company budgets for and includes in contract documents, provisions for payment to the pipeline contractors for wet soils shutdown thereby removing any potential incentive for the contractor to work in wet conditions.

In addition, the Company's inspection staff and the Joint Committee with the assistance of the construction monitor are responsible for ensuring that construction activities do not occur during wet soils shutdown. This would include shutting down construction activities if soils became wet during the day.

It should, however, be recognized that there may be situations when construction activities cannot be carried out during the normal construction period due to delays in project timing and it may become necessary to work in wet conditions in the spring or fall of the year. Where construction activities are undertaken by the Company in wet soil conditions (as determined by the monitor), additional mitigation measures may be put in place to minimize resulting damages. Mitigation measures may, where appropriate, be developed by the Company on a site specific basis and may include avoiding certain areas, full easement stripping, geotextile roads, the use of swamp mats, or the use of other specialized equipment where deemed appropriate by the Company. The Company will authorize work in wet soils conditions only when all other reasonable alternatives have been exhausted.

Where construction activities are undertaken by the Company in wet soil conditions (as determined by the monitor), the Company shall pay to the landowner 150% of disturbance and crop loss damage compensation on the area affected by the activities (area also to be determined by the construction monitor). The 150% payment applies only once to any one area; on areas where the 150% payment is applied, the landowner forfeits the right to top-up of crop loss damages under the L.O.U.. The 150% payment does not affect the landowner's right to topsoil replacement where crop loss exceeds 50% in the fifth year following construction.



CANADA

CONSOLIDATION

CODIFICATION

# National Energy Board Act

# Loi sur l'Office national de l'énergie

R.S.C., 1985, c. N-7

L.R.C. (1985), ch. N-7

Current to December 15, 2014

À jour au 15 décembre 2014

Last amended on October 31, 2014

Dernière modification le 31 octobre 2014

Published by the Minister of Justice at the following address:  
<http://laws-lois.justice.gc.ca>

Publié par le ministre de la Justice à l'adresse suivante :  
<http://lois-laws.justice.gc.ca>

	poses of this section be deemed to be a decision or order of the Board. R.S., c. N-6, s. 19; R.S., c. 10(2nd Supp.), s. 65.	ticle, être des décisions ou ordonnances de l'Office. S.R., ch. N-6, art. 19; S.R., ch. 10(2 <sup>e</sup> suppl.), art. 65.	
Public hearings	<b>24.</b> (1) Subject to subsection (2), hearings before the Board with respect to the issuance, revocation or suspension of certificates or for leave to abandon the operation of a pipeline shall be public.	<b>24.</b> (1) Sous réserve du paragraphe (2), doivent faire l'objet d'audiences publiques les cas de délivrance, d'annulation ou de suspension de certificats ainsi que les demandes de cessation d'exploitation d'un pipeline.	Audiences publiques
Exception	(2) A public hearing need not be held where the Board, on the application or with the consent of the holder, revokes or suspends  (a) a certificate issued in respect of an international or interprovincial power line, regardless of whether the power line has been brought into commercial operation under that certificate; or  (b) a certificate issued in respect of a pipeline, if the pipeline has not been brought into commercial operation under that certificate.	(2) Les cas d'annulation ou de suspension de certificat décidés à la demande ou avec le consentement du titulaire n'ont pas à faire l'objet d'une audience publique; l'exception n'est toutefois valable à l'égard d'un certificat visant un pipeline que si ce dernier n'a pas encore été commercialement mis en service.	Exception
Other matters	(3) The Board may hold a public hearing in respect of any other matter if it considers it advisable to do so.  R.S., 1985, c. N-7, s. 24; 1990, c. 7, s. 12; 2012, c. 19, s. 81.	(3) L'Office peut, s'il l'estime utile, tenir une audience publique sur toute autre question.  L.R. (1985), ch. N-7, art. 24; 1990, ch. 7, art. 12; 2012, ch. 19, art. 81.	Autres sujets

FEES, LEVIES AND CHARGES

Regulations imposing fees, etc.	<b>24.1</b> (1) Subject to the approval of the Treasury Board, the National Energy Board may, for the purposes of recovering all or a portion of such costs as the National Energy Board determines to be attributable to its responsibilities under this or any other Act of Parliament, make regulations  (a) imposing fees, levies or charges on any person or company authorized under this Act to  (i) construct or operate a pipeline or an international or interprovincial power line,  (ii) charge tolls,  (iii) export or import oil or gas, or  (iv) export electricity; and  (b) providing for the manner of calculating the fees, levies and charges in respect of the person or company and their payment to the National Energy Board.
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DROITS, REDEVANCES ET FRAIS

	<b>24.1</b> (1) Sous réserve de l'agrément du Conseil du Trésor, et afin de recouvrer tout ou partie des frais qu'il juge afférents à l'exercice de ses attributions dans le cadre de la présente loi et de toute autre loi fédérale, l'Office peut, par règlement :  a) imposer des droits, redevances ou frais à chaque personne ou compagnie pouvant, au titre de la présente loi, construire ou exploiter un pipeline ou une ligne internationale ou interprovinciale, exiger des droits, exporter ou importer du gaz ou du pétrole ou exporter de l'électricité;  b) déterminer leur mode de calcul à l'égard de la personne ou de la compagnie et prévoir leur paiement.	Règlement d'imposition
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route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;

(b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and sell or otherwise dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline;

(c) construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;

(d) join its pipeline with the transmission facilities of any other person at any point on its route;

(e) construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance and operation of its pipeline;

(f) construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;

(g) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;

(h) transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and

(i) do all other acts necessary for the construction, maintenance and operation of its pipeline.

R.S., 1985, c. N-7, s. 73; 2004, c. 25, s. 154.

Limitations on purchase and sale, etc.

**74.** (1) A company shall not, without the leave of the Board,

(a) sell, transfer or lease to any person its pipeline, in whole or in part;

(b) purchase or lease any pipeline from any person;

le tracé de son pipeline, et y faire les levés, examens ou autres préparatifs requis pour fixer l'emplacement de celui-ci et marquer et déterminer les parties de terrain qui y seront appropriées;

b) acquérir et détenir les terrains ou autres biens nécessaires à la construction, à l'entretien et à l'exploitation de son pipeline, et disposer, notamment par vente, de toute partie des terrains ou biens devenue, pour quelque raison, inutile aux fins de la canalisation;

c) construire, poser, transporter ou placer son pipeline sur, à travers ou sous les terrains situés le long du tracé du pipeline;

d) raccorder son pipeline, à un point quelconque de son tracé, aux installations de transport appartenant à d'autres personnes;

e) construire et entretenir les chemins, bâtiments, maisons, gares et stations, dépôts, quais, docks et autres ouvrages utiles à ses besoins, et construire ou acquérir des machines et autres appareils nécessaires à la construction, à l'entretien et à l'exploitation de son pipeline;

f) construire, entretenir et exploiter des branchements et exercer à cette fin les attributions qu'elle a à l'égard du pipeline;

g) modifier, réparer ou cesser d'utiliser tout ou partie des ouvrages mentionnés au présent article et les remplacer par d'autres;

h) transporter des hydrocarbures par pipeline et fixer les moments où se fait le transport, la manière dont il se fait, ainsi que les droits à percevoir en l'espèce;

i) prendre toutes les autres mesures nécessaires à la construction, à l'entretien et à l'exploitation de sa canalisation.

L.R. (1985), ch. N-7, art. 73; 2004, ch. 25, art. 154.

**74.** (1) La compagnie ne peut, sans l'autorisation de l'Office :

Restrictions

a) vendre, transférer ou donner à bail tout ou partie de son pipeline;

b) acheter ou prendre à bail un pipeline;

	(c) enter into an agreement for amalgamation with any other company; or	c) conclure un accord de fusion avec une autre compagnie;	
	(d) abandon the operation of a pipeline.	d) cesser d'exploiter un pipeline.	
Definition of "pipeline" and "company"	(2) For the purposes of paragraph (1)(b), "pipeline" includes a pipeline as defined in section 2 or any other pipeline, and, for the purposes of paragraph (1)(c), "company" includes a company as defined in section 2 or any other company.	(2) Pour l'application des alinéas (1) b) et c), respectivement, le sens des termes « pipeline » et « compagnie » n'est pas limité à celui que leur donne l'article 2.	Définition de « pipeline » et de « compagnie »
Exception	(3) Despite paragraph (1)(a), leave shall only be required if a company sells, transfers or leases any part or parts of its pipeline that are capable of being operated as a line for the transmission of gas or oil. R.S., 1985, c. N-7, s. 74; 2004, c. 25, s. 155.	(3) Malgré l'alinéa (1)a), l'autorisation n'est requise que dans le cas où une compagnie vend, transfère ou donne à bail la ou les parties de son pipeline qui sont susceptibles d'être exploitées pour le transport du pétrole ou du gaz. L.R. (1985), ch. N-7, art. 74; 2004, ch. 25, art. 155.	Exception
Damages and compensation	<b>75.</b> A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers. R.S., c. N-6, s. 64.	<b>75.</b> Dans l'exercice des pouvoirs qui lui sont conférés par la présente loi ou une loi spéciale, la compagnie doit veiller à causer le moins de dommages possibles et, selon les modalités prévues à la présente loi et à une loi spéciale, indemniser pleinement tous les intéressés des dommages qu'ils ont subis en raison de l'exercice de ces pouvoirs. S.R., ch. N-6, art. 64.	Indemnisation
Exercise of powers outside Canada	<b>76.</b> A company operating a pipeline from a place in Canada to a place on the international boundary line may exercise, beyond that boundary, in so far as permitted by the laws there in force, the powers that it may exercise in Canada. R.S., c. N-6, s. 65.	<b>76.</b> La compagnie qui exploite un pipeline se rendant à la frontière internationale peut exercer au-delà de cette frontière, dans la mesure où les lois du lieu le permettent, les pouvoirs qu'elle peut exercer au Canada. S.R., ch. N-6, art. 65.	Exercice des pouvoirs à l'étranger
TAKING AND USING LANDS		PRISE DE POSSESSION ET UTILISATION DE TERRAINS	
Crown lands	<b>77.</b> (1) No company shall take possession of, use or occupy lands vested in Her Majesty without the consent of the Governor in Council.	<b>77.</b> (1) La compagnie ne peut prendre possession de terrains dévolus à Sa Majesté, ni les utiliser ou les occuper, sans le consentement du gouverneur en conseil.	Terres domaniales
Consent	(2) A company may, with the consent of the Governor in Council and on such terms as the Governor in Council may prescribe, take and appropriate, for the use of its pipeline and works, so much of the lands of Her Majesty lying on the route of the line that have not been granted, conceded or sold, as is necessary for the pipeline, and also so much of the public beach, or bed of a lake, river or stream, or of the lands so vested covered with the waters of a lake, river or stream as is necessary for making, completing and using its pipeline and works.	(2) Avec le consentement du gouverneur en conseil et aux conditions fixées par celui-ci, la compagnie peut prendre et s'approprier toute partie, nécessaire au pipeline, des terrains de Sa Majesté non concédés ou vendus et se trouvant sur le tracé de la canalisation, ainsi que la partie, nécessaire à la construction, au parachèvement et à l'utilisation de son pipeline, soit de la grève publique ou du lit public d'une étendue d'eau soit des terrains visés ci-dessus et couverts par une étendue d'eau.	Consentement

HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

## BILL C-46

## PROJET DE LOI C-46

An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act

Loi modifiant la Loi sur l'Office national de l'énergie et la Loi sur les opérations pétrolières au Canada

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

### SHORT TITLE

### TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Pipeline Safety Act*.

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1. *Loi sur la sûreté des pipelines.*

Titre abrégé

R.S., c. N-7

### NATIONAL ENERGY BOARD ACT

### LOI SUR L'OFFICE NATIONAL DE L'ÉNERGIE

L.R., ch. N-7

2. Section 2 of the *National Energy Board Act* is amended by adding the following in alphabetical order:

2. L'article 2 de la *Loi sur l'Office national de l'énergie* est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

"abandoned pipeline"  
« pipeline abandonné »

"abandoned pipeline" means a pipeline the operation of which has been abandoned with the leave of the Board as required by paragraph 74(1)(d) and that remains in place;

« corps dirigeant autochtone » Conseil, gouvernement ou autre entité autorisé à agir pour le compte :

« corps dirigeant autochtone »  
"Aboriginal governing body"

"Aboriginal governing body"  
« corps dirigeant autochtone »

"Aboriginal governing body" means a council, government or other entity authorized to act on behalf of

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a) soit d'une bande au sens du paragraphe 2(1) de la *Loi sur les Indiens*;

b) soit d'une première nation, d'un peuple autochtone ou de tout organisme autochtone qui est partie à un accord sur des revendications territoriales ou à tout autre traité, à un accord sur l'autonomie gouvernementale ou à une entente de règlement.

"compensable damage"  
« dommages indemnissables »

"compensable damage" means the costs, losses and damages for which the Tribunal may award compensation;

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« dommages indemnissables » Les coûts, pertes et préjudices pour lesquels le Tribunal peut accorder une indemnité.

« dommages indemnissables »  
"compensable damage"

Pouvoir de décision	(2) Après audition de <u>la demande visée</u> au présent article, l'Office peut soit infirmer, confirmer ou modifier l'arrêté ou la mesure du délégué à l'exploitation, soit ordonner d'entreprendre les travaux qu'il juge nécessaires pour empêcher le gaspillage ou le dégagement de pétrole ou de gaz ou pour prévenir toute contravention à la <i>Loi sur les opérations pétrolières au Canada</i> ou à ses règlements, soit rendre toute ordonnance qu'il juge indiquée.	(2) Après audition de <u>la demande visée</u> au présent article, l'Office peut soit infirmer, confirmer ou modifier l'arrêté ou la mesure du délégué à l'exploitation, soit ordonner d'entreprendre les travaux qu'il juge nécessaires pour empêcher le gaspillage ou le dégagement de pétrole ou de gaz ou pour prévenir toute contravention à la <i>Loi sur les opérations pétrolières au Canada</i> ou à ses règlements, soit rendre toute ordonnance qu'il juge indiquée.	Pouvoir de décision
1994, c. 10, s. 23	<b>10. The heading before section 28.6 of the Act is repealed.</b>	<b>10. L'intertitre précédant l'article 28.6 de la même loi est abrogé.</b>	1994, ch. 10, art. 23
1994, c. 10, s. 23	<b>11. Subsection 28.6(1) of the Act is replaced by the following:</b>	<b>11. Le paragraphe 28.6(1) de la même loi est remplacé par ce qui suit :</b>	1994, ch. 10, art. 23
Application	<b>28.6</b> (1) This section applies to an order referred by the Chief Safety Officer or the Chief Conservation Officer to the Board under subsection 58(5) of the <i>Canada Oil and Gas Operations Act</i> .	<b>28.6</b> (1) Le présent article s'applique aux ordres communiqués à l'Office par le délégué à la sécurité ou par le délégué à l'exploitation en application du paragraphe 58(5) de la <i>Loi sur les opérations pétrolières au Canada</i> .	Demande de révision
1990, c. 7, s. 14	<b>12. The heading "CONSTRUCTION AND OPERATION OF PIPELINES" before section 29 of the Act is replaced by the following:</b>	<b>12. Le titre de la partie III de la même loi est remplacé par ce qui suit :</b>	1990, ch. 7, art. 14
	CONSTRUCTION, OPERATION AND <u>ABANDONMENT OF PIPELINES</u>	CONSTRUCTION, EXPLOITATION ET <u>CESSATION D'EXPLOITATION DES PIPELINES</u>	
	<b>13. Section 29 of the Act is amended by adding the following after subsection (3.1):</b>	<b>13. L'article 29 de la même loi est modifié par adjonction, après le paragraphe (3.1), de ce qui suit :</b>	
Successor or assign — abandoned pipeline	(4) For the purposes of this Act, a successor or assign of a company is deemed to be a company for any matter relating to an abandoned pipeline.	(4) Pour l'application de la présente loi, l'ayant droit ou le successeur d'une compagnie est réputé être une compagnie relativement à toute question relative à un pipeline abandonné.	Ayant droit ou successeur — pipeline abandonné
	<b>14. The heading before section 48 of the Act is replaced by the following:</b>	<b>14. L'intertitre précédant l'article 48 de la même loi est remplacé par ce qui suit :</b>	
	REGULATION OF CONSTRUCTION, <u>OPERATION AND ABANDONMENT</u>	RÉGLEMENTATION DE LA CONSTRUCTION, <u>DE L'EXPLOITATION ET DE LA CESSATION D'EXPLOITATION</u>	
2004, c. 15, ss. 84(1) and (2)(E)	<b>15. (1) Subsections 48(1.1) and (2) of the Act are replaced by the following:</b>	<b>15. (1) Les paragraphes 48(1.1) et (2) de la même loi sont remplacés par ce qui suit :</b>	2004, ch. 15, par. 84(1) et (2)(A)



Other measures	(1.1) The Board may order a company to take measures <u>in respect</u> of a pipeline or an <u>abandoned pipeline</u> that the Board considers necessary for	(1.1) L'Office peut ordonner à la compagnie de prendre, <u>relativement à un pipeline ou à un pipeline abandonné</u> , les mesures qu'il estime nécessaires :	Autres mesures
	(a) the safety and security of the public, of the company's employees or of the pipeline or the abandoned pipeline; or  (b) the protection of property or the environment.	a) à la sécurité du public ou des employés de la compagnie ou à la sûreté et à la sécurité de ce pipeline ou de ce pipeline abandonné;  b) à la protection des biens ou de l'environnement.	5
Measures to be taken	(1.2) If a company does not comply with an order of the Board referred to in subsection (1.1) or an order of an inspection officer made under subsection 51.1(1), the Board or any of its officers or employees — or class of officers and employees — that the Board authorizes may take any action or measure that they consider necessary in relation to the abandonment of a pipeline by the company or in relation to the company's abandoned pipeline, or they may authorize a third party to take any such action or measure.	(1.2) L'Office ou un membre — ou une catégorie de membres — de son personnel qu'il autorise à cet effet peut prendre les mesures qu'il estime nécessaires relativement à la cessation d'exploitation du pipeline, ou relativement au pipeline abandonné, d'une compagnie qui ne se conforme pas à une ordonnance visée au paragraphe (1.1) ou à un ordre visé au paragraphe 51.1(1), ou autoriser un tiers à les prendre.	10 Mesures à prendre
No liability	(1.3) No action lies against the Board or an officer or employee of the Board or against Her Majesty in right of Canada or an employee of Her Majesty for anything done or omitted to be done in taking any action or measure referred to in subsection (1.2).	(1.3) Aucun recours ne peut être intenté contre l'Office ou un membre de son personnel ou contre Sa Majesté du chef du Canada ou l'un de ses fonctionnaires pour les actes ou omissions commis dans la prise de toute mesure en vertu du paragraphe (1.2).	20 Immunité judiciaire
Third party liability	(1.4) A third party that is authorized under subsection (1.2) to take any action or measure referred to in that subsection is not liable in respect of any act or omission committed in taking those actions or measures unless it is shown that the third party did not act reasonably in the circumstances.	(1.4) Le tiers autorisé au titre du paragraphe (1.2) à prendre des mesures visées à ce paragraphe n'encourt aucune responsabilité pour les actes ou omissions commis dans la prise de ces mesures, sauf s'il est démontré qu'il n'a pas agi raisonnablement dans les circonstances.	25 Responsabilité des tiers
Regulations as to safety and security	(2) The Board may, with the Governor in Council's approval, make regulations  (a) governing the design, construction, operation and abandonment of a pipeline;  (b) providing for the protection of property and the environment and the safety and security of the public and of the company's employees in the <u>design</u> , construction, operation and abandonment of a pipeline; and  (c) governing abandoned pipelines.	(2) L'Office peut, avec l'approbation du gouverneur en conseil, prendre des règlements :  a) concernant la conception, la construction, l'exploitation et la cessation d'exploitation d'un pipeline;  b) concernant la protection des biens et de l'environnement et la sécurité du public et du personnel de la compagnie dans le cadre des opérations visées à l'alinéa a);  c) concernant les pipelines abandonnés.	35 Règlements sur la sécurité

**(2) Section 48 of the Act is amended by adding the following after subsection (2.2):**

**(2) L'article 48 de la même loi est modifié par adjonction, après le paragraphe (2.2), de ce qui suit :**

Regulations —  
Governor in  
Council

(2.3) Without limiting the scope of the regulations that the Board may make under subsection (2), the Governor in Council may, on the Minister's recommendation, make regulations

(a) specifying requirements with respect to monitoring pipelines; and

(b) respecting the actions or measures to be taken in preparation for or in the case of an unintended or uncontrolled release of oil, gas or any other commodity from a pipeline.

**16. The Act is amended by adding the following after section 48:**

**48.1** (1) No person shall, without the Board's leave, make contact with, alter or remove an abandoned pipeline.

(2) The Board may, on granting an application for leave under this section, impose any terms that it considers proper.

(3) The Board may make orders or regulations governing the circumstances in which or conditions under which leave is not necessary.

**POLLUTER PAYS PRINCIPLE**

**48.11** The purpose of sections 48.12 to 48.17 is to reinforce the "polluter pays" principle by, among other things, imposing financial requirements on any company that is authorized under this Act to construct or operate a pipeline.

**LIABILITY**

**48.12** (1) If an unintended or uncontrolled release from a pipeline of oil, gas or any other commodity occurs, all persons to whose fault or negligence the release is attributable or who are by law responsible for others to whose fault or negligence the release is attributable are jointly and severally, or solidarily, liable for

Recovery of  
loss, damage,  
costs, expenses

Règlements

(2.3) Sans que soit limitée la portée des règlements que peut prendre l'Office en vertu du paragraphe (2), le gouverneur en conseil peut, sur recommandation du ministre, par règlement :

a) prévoir des exigences à l'égard de la surveillance des pipelines;

b) régir les mesures à prendre en cas de rejet non intentionnel ou non contrôlé de pétrole, de gaz ou de tout autre produit d'un pipeline ou afin d'être prêt à faire face à un rejet.

**16. La même loi est modifiée par adjonction, après l'article 48, de ce qui suit :**

**48.1** (1) Il est interdit, sans l'autorisation de l'Office, de venir en contact avec un pipeline abandonné, de le modifier ou de l'enlever.

(2) L'Office peut assortir l'autorisation des conditions qu'il estime indiquées.

(3) L'Office peut rendre des ordonnances ou prendre des règlements concernant les circonstances ou conditions dans lesquelles il n'est pas nécessaire d'obtenir l'autorisation.

**PRINCIPE DU POLLUEUR-PAYEUR**

**48.11** Les articles 48.12 à 48.17 ont pour objet le renforcement du principe du pollueur-payeur par, notamment, l'imposition d'obligations financières aux compagnies autorisées, au titre de la présente loi, à construire ou à exploiter un pipeline.

**RESPONSABILITÉ**

**48.12** (1) Lorsqu'il y a un rejet non intentionnel ou non contrôlé de pétrole, de gaz ou de tout autre produit d'un pipeline, toutes les personnes à la faute ou négligence desquelles ce rejet est attribuable ou qui sont légalement responsables de préposés à la faute ou négligence desquels ce rejet est attribuable sont solidairement responsables :

Pipeline  
abandonné

Conditions

Exception

Objet

Recouvrement  
des pertes, frais,  
etc. — rejets

## LEGISinfo

## House Government Bill

**41st Parliament, 2nd Session**

October 16, 2013 - Present

**C-46**

AN ACT TO AMEND THE NATIONAL ENERGY BOARD ACT AND THE CANADA OIL AND GAS OPERATIONS ACT

Short Title  
Pipeline Safety Act

Sponsor

**Minister of Natural Resources and Minister for the Federal Economic Development Initiative for Northern Ontario**

Last Stage Completed

**Second Reading and Referral to Committee in the House of Commons** (2015-03-09)

Progress: ■■■■■■

## Status of the Bill

 Show Details  Hide Details**House of Commons****First Reading** Hide SittingsChamber Sitting: 157 [2014-12-08](#)**Introduction and First Reading 2014-12-08****Second Reading** Hide SittingsChamber Sitting: 162 [2015-01-26](#)Chamber Sitting: 180 [2015-02-26](#)Chamber Sitting: 182 [2015-03-09](#)**Second Reading and Referral to Committee 2015-03-09****Committee****[STANDING COMMITTEE ON NATURAL RESOURCES](#)**

2006 CarswellOnt 7980  
Ontario Superior Court of Justice

Canadian Alliance of Pipeline Landowners' Assn. v. Enbridge Pipelines Inc.

2006 CarswellOnt 7980

**Proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6**

Canadian Alliance of Pipeline Landowners' Associations, 488796 Ontario Limited and Ronald Kerr (Plaintiffs) and Enbridge Pipelines Inc. and TransCanada Pipelines Limited (Defendants)

E. Macdonald J.

Heard: January 12-13, 2006; February 13, 2006

Judgment: November 20, 2006

Docket: 04-CV-279193CP

Counsel: Paul G. Vogel, John D. Goudy for Plaintiffs

J.L. McDougall, Q.C., Matthew Fleming, John Fabello for Defendant, TransCanada Pipelines Limited

Harry Underwood, Darryl Ferguson for Defendant, Enbridge Pipelines Inc.

Subject: Civil Practice and Procedure; Natural Resources; Property

**Table of Authorities**

**Cases considered by E. Macdonald J.:**

*Balisky v. Canada (Minister of Natural Resources)* (2003), [2003] 4 F.C. 30, 239 F.T.R. 159 (note), 301 N.R. 104, 2003 CarswellNat 1828, 2003 FCA 104, 2003 CarswellNat 516, 1 C.E.L.R. (3d) 7 (Fed. C.A.) — referred to

*Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 26 C.P.C. (4th) 1, 111 O.A.C. 201, 164 D.L.R. (4th) 257, 1998 CarswellOnt 3202, 20 R.P.R. (3d) 207 (Ont. C.A.) — referred to

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*Henderson v. Henderson* (1843), [1843-60] All E.R. Rep. 378, 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) — referred to

*Las Vegas Strip Ltd. v. Toronto (City)* (1996), 13 O.T.C. 308, 1996 CarswellOnt 3426, 34 M.P.L.R. (2d) 233, 38 C.R.R. (2d) 129, 30 O.R. (3d) 286 (Ont. Gen. Div.) — referred to

*Las Vegas Strip Ltd. v. Toronto (City)* (1997), 32 O.R. (3d) 651, 99 O.A.C. 67, 1997 CarswellOnt 1279 (Ont. C.A.) — referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5(1)(a) — referred to

*National Energy Board Act*, S.C. 1959, c. 46

Generally — referred to

*National Energy Board Act*, R.S.C. 1985, c. N-7

Generally — referred to

Pt. V — referred to

s. 48(2) — referred to

s. 58.25(2) [en. 1990, c. 7, s. 23] — referred to

s. 58.25(3) [en. 1990, c. 7, s. 23] — referred to

s. 73 — referred to

s. 75 — considered

s. 84 — referred to

ss. 84-107 — referred to

s. 86 — referred to

s. 87(3) — referred to

s. 88 — referred to

s. 89 — referred to

s. 90 — referred to

s. 90(1) — referred to

ss. 90-103 — referred to

s. 91 — referred to

s. 112 — considered

s. 112(1) — referred to

s. 112(2) — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20 — pursuant to

**Regulations considered:**

*National Energy Board Act*, R.S.C. 1985, c. N-7

*National Energy Board Pipeline Crossing Regulations, Part I*, SOR/88-528

Generally — considered

s. 2 "facility" — referred to

s. 3 — referred to

*National Energy Board Pipeline Crossing Regulations, Part II*, SOR/88-529

Generally — considered

MOTION by defendants for summary judgment; MOTION by plaintiffs for order certifying class action.

### ***E. Macdonald J.:***

1 There are two motions in this class proceeding. The Plaintiffs seek an order that their action satisfies the certification requirements of s. 5 (1) (a) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("*CPA*"). They say that their pleadings disclose a cause of action. The Plaintiffs also ask that the Defendants' motions for summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure* be dismissed.

2 For the reasons set out below, I have decided that the motions for summary judgment shall succeed. This disposition means that the certification issues under the *CPA* are moot.

### **The Parties**

3 The Defendant Enbridge Pipelines Inc. ("Enbridge") owns and operates interprovincial pipelines for the transmission of hydrocarbons. These include Lines 7, 8, and 9, constructed in 1956, 1967-1973 and 1974 respectively, which are now used for the transmission of petroleum products. The Defendant TransCanada Pipelines Limited ("TCPL") owns and operates approximately 15,000 kilometres of pipeline in Southwestern Ontario and other parts of Canada.

4 To construct these pipelines, the Defendants acquired pipeline easements by entering into a number of easement agreements with various landowners. Enbridge's easements affected in excess of 1500 landowners in Southwestern Ontario in and after 1957. TCPL acquired its easement agreements for Southwestern Ontario in 1964.

5 The Plaintiff Canadian Alliance of Pipeline Landowners' Association ("CAPLA") is an organization whose members are associations representing the interests of agricultural landowners whose lands are affected by the pipeline easements of the Defendants.

6 The Plaintiff 488796 Ontario Limited ("488796") owns lands in Lambton County, part of which are subject to an easement in favour of Enbridge. This easement was acquired pursuant to an agreement dated March 18, 1957 between 488796's predecessors in title and the Interprovincial Pipe Line Company (now Enbridge). The Plaintiff Ronald Kerr owns agricultural lands in the Township of St. Clair in Lambton County, part of which is encumbered by a pipeline easement in favour of TCPL. Both 488796 and Ronald Kerr are members of a CAPLA member association.

### **The Plaintiffs' Action under the CPA**

7 The Plaintiffs commenced this action under the *CPA* claiming compensation or damages against the Defendants for ownership rights restrictions, regulatory risk, and loss of use and enjoyment of lands. The action is proposed to be brought on behalf of all landowners who had previously granted to Enbridge or to TCPL an easement to run a pipeline over their lands.

8 The essence of the Plaintiffs' claim is that they allege that since 1990 they have suffered economic injury by virtue of the enactment of s. 112 of the *National Energy Board Act*, R.S.C., c. N-7 (the "*NEB Act*") and the related *Pipeline Crossing Regulations*, SOR/88-528 and 529. They also claim injury due to the Defendant's alleged breach of the easement agreements. The injuries include interferences with drainage installation, repairs to their lands, and interference with cultivation and harvesting. They allege that these interferences have grown in direct relation to the changes that have arisen from the evolution of modern farming practices that include the use of heavy equipment unheard of in the late 1950s and the mid 1960s when the easements were negotiated and granted.

### **The Defendants' Motion for Summary Judgement**

9 Summary judgment is to be granted if there is no genuine issue for trial (*Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.)). The parties concede that in the event that the Defendants' motion for summary judgment succeeds, the Plaintiffs' motion for certification under the *CPA* will become moot and the action will be dismissed.

10 There are two alternative causes of action advanced by the plaintiffs. First, there is a claim seeking statutory compensation pursuant to s. 75 of the *NEB Act*. Second, there is a claim for compensation allegedly owed under individual easement agreements and for damages for breach of these agreements. The plaintiffs seek both past and future compensation or damages. The compensation in question is said to reflect the economic injury arising from ownership right restrictions, regulatory risks and the loss of use and enjoyment of the land.

11 In my opinion, neither of these proposed causes of action can be made out. Consequently, there is no genuine issue for trial, and the Plaintiffs' action is dismissed.

#### **A. The proposed claim for statutory compensation pursuant to s. 75 of the NEB Act**

##### *(i) Part v of the NEB Act*

12 To state the obvious, the *NEB Act* applies to all federally regulated pipelines. It establishes the National Energy Board (the "NEB") and confers responsibility and authority upon the NEB to promote the safe operation of pipelines. Subsection 48 (2) of the *NEB Act* confers upon the NEB authority to make regulations, with the approval of the Governor General in Council, which provide for the protection of property and the environment and the safety of the public and the companies' employees in the construction and operation of pipelines.

13 On June 1, 1990, Parliament enacted and proclaimed in force Part V of the *NEB Act*, "Powers of Pipeline Companies". Subsections 112 (1) and (2) provide in part as follows:

- (1) Subject to subsection (5), no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.
- (2) Subject to subsection (5), no person shall operate a vehicle or mobile equipment across a pipeline unless leave is first obtained from the company...

14 The Plaintiffs say that under the provisions of s. 112 of the *NEB Act* and the related *Pipeline Crossing Regulations*, a control zone extends 30 metres adjacent to both sides of the Defendants' pipeline easements. Pursuant to the *Pipeline Crossing Regulations*, Part 1, ss. 2 and 3, company consent or leave of the NEB is required for construction or installation of a "facility" or for activities disturbing more than 0.3 metres (12 inches) of soil or reducing cover over the pipe on easement or in the control zone. "Facility" includes a fence, private road, irrigation ditch, and drain or drainage system.

15 The *Pipeline Crossing Regulations* set out the details of what occurs when company consent is required for the activities described above. The request is to be made in writing and the pipeline companies have 10 working days in which to notify the landowners of its decision. If the pipeline companies grant approval for the activity, the landowner must provide at least 3 working days notice before commencing work and at least 24 hours notice prior to backfilling over a pipe. Within the 3

working day notice period provided for the company to locate its pipes, the pipeline company may designate an area situated in the vicinity of the proposed facility or excavation, which may extend beyond the control zone to the whole of the landowner's property. Landowners are required to maintain in a state of good repair any facility they construct or install upon or adjacent to the pipeline easements. Pipeline companies must inspect such facilities and inform landowners of any deterioration that is detected. Landowners must immediately correct any deterioration noted by the pipeline company.

16 The content of the *Pipeline Crossing Regulations* and the statutory obligations that they create reveal a very detailed regime governing the activities of both the landowners and the pipeline companies. It is not disputed among the parties to this proceeding that the content of the regulations is driven by concerns for public safety.

(ii) *The Plaintiffs' claim*

17 In their statement of claim and reply, the Plaintiffs set out what they say to be the adverse impacts of the regulations upon the landowners resulting from:

- (a) Inability to make efficient use of modern cultivation technologies and large scale farm equipment;
- (b) Facility construction and expansion restrictions or forced location on alternate sites;
- (c) Time delays;
- (d) Operational disruptions and interference with management flexibility;
- (e) The restriction or limitation of control zone or easement activities to limit criminal and civil liability exposure; and/or,
- (f) Limited land rental and sharecropping opportunities and decreased rental value.

18 The Plaintiff Ronald Kerr swore an affidavit in support of these proceedings on October 29, 2004. He was cross-examined by Enbridge and TCPL. Since the 1970s, Mr. Kerr has owned and farmed agricultural lands in the Township of St. Clair in Lambton County. In 1997, Mr. Kerr caused to be incorporated Basswood Farms Incorporated ("Basswood"). He is an officer and director of Basswood. Along with his brother, son and nephew, Mr. Kerr is responsible for a cash crop operation involving 5,000 acres of farmland. This is a sophisticated and profitable operation. When Mr. Kerr initially acquired interests in the properties that he now farms, he was advised and understood that a portion of the lands were encumbered by a pipeline easement in favour of TCPL. Mr. Kerr says that despite "the limited land use restrictions applicable to my lands at the time of the Grants of Easement", his use and enjoyment of his lands has been significantly circumscribed as a direct result of TCPL's operation and maintenance of its pipeline. He further deposes to the impact on his farming operations as a result of the enactment of the *Pipeline Crossing Regulations* in 1988 and the re-enactment of s. 112 of the *NEB Act*, in 1990. He summarizes these restrictions as follows:

1. restrictions on the right of the landowner to use and enjoy lands was extended to lands beyond the pipeline easement by the creation of the 30 meter control zone on either side of the pipeline easement;
2. crossing the pipeline easement which had not previously been regulated was prohibited without permission from the pipeline company;
3. leave of the pipeline company was required in order to carry out certain work on the easement and within the control zone and,
4. pipeline companies were given authority to restrict the use and enjoyment of lands extending to the entire farm property on which a pipeline was located.



19 The essence of Mr. Kerr's position is that s. 112 of the *NEB Act* and the *Pipeline Crossing Regulations* provide Enbridge and TCPL with both control and authority over lands outside their easements and increased authority over the pipeline easement itself.

20 At this point I choose to mention the role of David Core ("Mr. Core") who has been the president of CAPLA since it was formed in 2000. He is also a director of the Ontario Pipeline Landowners' Association ("OPLA") one of CAPLA's constituent organizations since 2000. OPLA has 180 landowner members. In his affidavit, Mr. Core testified that the lands owned by 488796 consist of 100-acre parcel that is subject to Enbridge's easement and the second 100-acre parcel across the road. He explained that these lands are planted in cash crops that are rotated among the fields in a three-year cycle. His evidence goes back to my comments about sophisticated farming techniques and the use of technologies that are advanced in compared to the uses of farming technologies in 1957 and thereafter when the easements were negotiated.

21 Mr. Core's farming activities involved repeated crossings of Enbridge's easement with modern and heavy agricultural equipment. He admits that he never considered it necessary to seek Enbridge's leave pursuant to s. 112 (2) of the *NEB Act*. The evidence is that Enbridge has conveyed to agricultural landowners that the company permits the operation of vehicles and mobile equipment across its pipeline for normal farming operations. The materials contained in the motion records disclose that Enbridge's brochures entitled "Keeping In Touch: Pipeline Safety and Emergency Information for Landowners", was mailed to each of the agricultural landowners and contains the following statement:

Enbridge does permit the operation of vehicles or mobile equipment across the ROW [right of way] for the purpose of normal farming operations, that is for ploughing, cultivation, planting, harvesting and similar activities routine to most farms, but excluding chisel ploughing, sub-soiling or ripping to more than 45 cm. in depth.

22 I mention Mr. Core because the evidence related to his role in these proceedings adds to the factual context that is important in the disposition of the ultimate questions that are before the court.

*(iii) Section 75 of the NEB Act does not create a civil cause of action*

23 I agree with the submission of Enbridge that there are 3 key elements to a right of compensation under s. 75 of the *NEB Act*. They are that: (i) companies shall compensate persons; (ii) for damages sustained by reason of the exercise of powers granted to companies under the *NEB Act*; and (iii) such compensation shall be made in the manner provided by the *NEB Act*. Inasmuch as Enbridge's submissions mirror those of TCPL I will refer to Enbridge's position in explaining why I am granting summary judgment. My comments below apply to both Defendants.

24 To my mind, it is correct to say, as the Defendants do, that a key element to compensation under s. 75 is that a company shall do as little damage as possible, and shall make full compensation "*in the manner provided in this Act.*" (Emphasis added)

25 The Defendants are also correct when they say that the "manner" is the comprehensive negotiation and arbitration regime set out in the *NEB Act* in ss. 84 to 107. These sections do not contemplate a civil right of action.

26 I agree with Mr. Harry Underwood and Mr. Darryl R. Ferguson that a careful reading of Part V of the *NEB Act*, of which s. 75 forms part, reveals the intention on the part of Parliament to create a complete code, one which, first, provides for the powers of pipeline companies (s. 73); second, provides for compensation to be included in land acquisition agreements (s. 86) and also provides for a statutory right of compensation of general application (s. 75) as well as limitations upon that right (s. 84); and third, provides for a range of dispute resolution mechanisms including assisted negotiations (ss. 88-89) and arbitration proceedings (ss. 90-103).

27 The *NEB Act* is an elaborate statutory regime governing pipelines that traverse this country. The importance of closely controlled regulations respecting pipelines is obvious. I agree with the point made by Mr. Underwood and Mr. Ferguson that when Parliament intends to create a civil cause of action by means of a federal statute, it does so in explicit and express terms. It was pointed out that a good illustration of this fact is found within the *NEB Act* itself. Subsection 58.25 (2) makes certain

persons acquiring land for the purpose of constructing or operating an international power line liable to those with an interest in land who suffer damages if a land acquisition is abandoned, and s. 58.25 (3) provides for a civil action to recover the damages. Subsection 87 (3) creates a similar liability, but provides for a civil action for the recovery of damages, in relation to a pipeline company's abandonment of an acquisition of land for a pipeline. The logic is that if Parliament had intended to also create a civil cause of action for the recovery of damages sustained as a result of a company's exercise of powers, it would have done so in plain and clear language in the same terms as it has done in other provisions of the *NEB Act*.

*(iv) The Plaintiffs' claim is barred by cause of action estoppel*

28 Even if it could be said that Part V of the *NEB Act* permits a civil cause of action for a violation of s. 75, the Plaintiffs are barred from bringing such an action by the doctrine of cause of action estoppel.

29 Key to the Defendants' response to the Plaintiffs' motion for certification is the fact that after these proceedings under the *CPA* were commenced in May 2000, *CAPLA*, on July 6, 2000, served upon the then Federal Minister of Natural Resources, the Honourable Ralph E. Goodale (the "Minister"), a Notice of Arbitration pursuant to s. 90 (1) of the *NEB Act* on behalf of 157 individual claimants, requesting that the Minister appoint an arbitration committee pursuant to s. 91 of the *NEB Act*. The Notice of Arbitration named the Defendants in this action as Respondents. The individual claimants sought damages from the Defendants under s. 75 of the *NEB Act* for the loss of interest in, and use and enjoyment of their lands as a result of what the alleged control zone restrictions in s. 112 of the *NEB Act*.

30 For convenience, I will set out the actual content of ss. 75, 90 and 91 of the *NEB Act*:

#### **Damages and compensation**

**75.** A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers.

#### **Request for arbitration**

**90.** (1) Where a company or an owner of lands wishes to dispense with negotiation proceedings under this Part or where negotiation proceedings conducted under this Part do not result in settlement of any compensation matter referred to in subsection 88(1), the company or the owner may serve notice of arbitration on the other of them and on the Minister requesting that the matter be determined by arbitration.

#### **Where subsequent disputes not settled**

(2) Where a company and a person who has had an award of compensation made in his favour or has entered into an agreement respecting compensation with the company are unable to settle any claim for damages arising out of the operations of the company or any matter respecting the compensation payable where annual or other periodic payments have been selected, the company or the person may serve notice of arbitration on the other of them and on the Minister requesting that the matter be determined by arbitration.

#### **Duties of Minister**

**91.** (1) Where the Minister is served with a notice of arbitration under this Part, the Minister shall,

(a) if an Arbitration Committee exists to deal with the matter referred to in the notice, forthwith serve the notice on that Committee; or

(b) if no Arbitration Committee exists to deal with the matter, forthwith appoint an Arbitration Committee and serve the notice on that Committee.

**Exception**

(2) The Minister shall not take any action under subsection (1) where the Minister is satisfied that the matter referred to in a notice of arbitration served on the Minister is a matter

(a) solely related to the amount of compensation that has been previously awarded by an Arbitration Committee and that, under the award, the amount is not subject to a review at the time the notice is served; or

(b) to which the arbitration procedures set out in this Part do not apply.

**Appointment of Committee without notice**

(3) The Minister may, of his own motion and without having been served with a notice of arbitration referred to in subsection (1), appoint an Arbitration Committee.

31 The Notice of Arbitration prompted many submissions contained in letters from legal counsel on all sides of this dispute. The Minister responded in a letter dated January 10, 2001. He took the position that the parties' dispute did not fall within the arbitration committees' jurisdiction. His letter declining to appoint an arbitration committee is reproduced in part below:

I have reviewed all of the correspondence and arguments provided by all parties with respect to this issue. After careful consideration, I am satisfied that the issue of compensation for the controlled area falls outside the scope of Part V of the NEB Act.

Although it is true that section 112 would not have been triggered had it not been for the construction of the pipeline, it remains that the damages sought for the controlled area are not a direct result of any activity of a pipeline company.

In addition, section 112 does not give any power to the pipeline companies. It creates a statutory duty on pipeline companies and landowners with respect to safety. Again, it cannot be said that the damages claimed are the result of the exercise of TransCanada or Enbridge's powers. This would be required under section 75 of the NEB Act in order for section 84 to be triggered.

For the above reasons, I am unable to appoint an arbitration committee to hear this matter. I therefore find it unnecessary to consider the various arguments with respect to procedure that were raised by the parties.

Yours sincerely,

"Ralph Goodale"

Ralph Goodale

32 I regard the Minister's ruling as final and this is so particularly given the Plaintiffs' failure to seek leave to appeal the Minister's refusal or to bring an application for judicial review. In his capacity as Minister, Mr. Goodale was a tribunal of competent jurisdiction acting in an administrative role. For these reasons, I accept the submissions made by Enbridge that cause of action estoppel is at play in this dispute. I refer to the cases cited in paragraph 69 of Enbridge's factum: *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.) at 115 ; *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.) at 637-638; *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 34 M.P.L.R. (2d) 233 (Ont. Gen. Div.), aff'd (1997), 32 O.R. (3d) 651 (Ont. C.A.).

33 The Minister's ruling is final and conclusive and determined whether or not the crucial issue of the existence of a claim for injury arising from s. 112 of the *NEB Act* gives rise to a right for compensation under s. 75. On this basis alone, I would say that the plaintiff's claims in this action are subject to dismissal.

(v) *The Balisky decision*

34 Much was made of the Federal Court of Appeal's decision in *Balisky v. Canada (Minister of Natural Resources)*, [2003] 4 F.C. 30 (Fed. C.A.). In light of the reasons set out above, I find it unnecessary to comment on whether or not *Balisky* was correctly or incorrectly decided.

***B. The proposed claim for breach of contract***

35 Referring to the wording of the easement agreements, the Plaintiffs say that the rights granted to the Defendants for the construction and operation of their pipelines is limited in the case of Enbridge to a strip of land 60 feet in width and in the case of TCPL to a strip of land 75 feet in width. In the Plaintiffs' factum on their motion for certification, they say at paragraph 13 that pursuant to the provisions of the easement agreements:

The defendants agreed to **"bury and maintain all pipelines so as not to interfere with the drainage or ordinary cultivation of the [easement lands]"** and landowners specifically retained **"the right fully to use and enjoy the said land except as may be necessary for the purposes herein granted to the grantee"**;

Under the Enbridge agreement, company consent was required only for certain on easement excavations or installations. No consent was required for on easement paving of farm lanes or private roads, erection of fences or the construction or repair of drains provided that 5 days notice of such work was given to the company;

With respect to the TCPL agreement, company consent was required only for on easement excavations or installations;

Enbridge agreed to compensate landowners **"for damage done to any buildings, crops, tile drains, fences, timber, culverts, bridges, lanes and livestock on the said land by reason of the rights hereinbefore granted"**. TCPL agreed to compensate landowners **"for any physical damages resulting from any of the rights granted herein"**.

[Emphasis contained in the factum]

36 It is apparent from the Fresh as Amended Statement of Claim that the Plaintiffs' allegations of breach of contract are based on the following grounds.

- (i) the pipeline companies have failed to confine their operations to the lands subject to the Easement;
- (ii) the pipeline companies have failed to keep their covenant not to restrict or interfere with the landowners' surface rights; and
- (iii) the pipeline companies have breached their covenant to pay compensation for damages suffered by the landowners as a result of the companies' operations.

37 In response to these allegations, Enbridge submits that the agreement does not contain the covenants alleged and secondly, even if such covenants were given, no conduct by the company can be considered a breach of them. Thirdly, all conduct of the company has been mandated by intervening legislation therefore giving rise to the defence that there is no actionable breach of contract. Again, inasmuch as Enbridge's submissions mirror those of TCPL I will refer to Enbridge's position in explaining why I am granting summary judgment. My comments below apply to both Defendants.

38 I accept as legally correct and the statements contained in Enbridge's factum on the motion for summary judgment that are at page 14 beginning with paragraph 40. These statements are sufficient to dispose of the Plaintiffs' allegations. I repeat them rather than editorialize them.

Finally, Enbridge is alleged to have promised to pay compensation for damages suffered by the landowners as a result of the company's operations. However, no such covenant appears anywhere in the Agreement. A contractual right to compensation is established by clause "Third" but it is limited in three important ways: (i) only to damage to buildings, crops, tile drains, fences, timber, culverts, bridges, lanes and livestock (none of which is mentioned in the plaintiffs' claim);

(ii) only to damage to the foregoing categories of property that occurs in "on the said land" is covered, thus excluding damage occurring elsewhere on the property; and (iii) only to damage caused "by reason of the exercise of the rights hereinbefore granted" by the owner to the pipeline company, thus excluding damage arising by reason of factors other than the companies' contractual rights (such as restrictions on the use of the lands imposed by legislation). No right of compensation is granted for any purely economic loss suffered as a result of the company's operations, much less to loss attributable to statutory restrictions placed on the use of the Easement.

.....

The law is clear that a contractual obligation is frustrated where made impossible to perform through a subsequent change in the law. The promisor is excused from performing his promise, and in particular is discharged from any liability for damages on account of non-performance. The classic statement of the principle is found in *Brewster v. Kitchell* (1795), 91 E.R. 177 (K.B.D.) per Holt, C.J. at p. 178:

Where the question is whether a covenant be repealed by Act of Parliament this is the difference, viz. Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: so if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed.

See also: *Baily v. De Crespigny* (1869), L.R. 4 (Q.B.) 180 *Chitty On Contracts*, 27<sup>th</sup> ed., Vol. 1, pp. 1106-1108 Treitel, *Frustration and Force Majeure* (1994), pp. 413-414.

39 The Plaintiffs have also alleged that the provisions of the 1959 *NEB Act* (those in force at the time TCPL acquired the easements) should govern the relationship between the parties. I agree with TCPL's submission that these provisions do not apply. The provisions of the 1959 *NEB Act* have been repealed, and there is no term that incorporates them into the easement agreements.

**Disposition**

40 Since the Plaintiffs have failed to establish a cause of action, there is no genuine issue for trial and the motion for summary judgment is allowed. Consequently, the motion for certification under the *CPA* is moot and it is therefore dismissed.

41 Any party wishing to make submissions as to costs may do so by way of brief written submissions to me within 30 days of the release of this judgment.

*Motion granted; Motion dismissed.*